



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY.

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

**COURTS OF LAST RESORT
OF THE SEVERAL STATES.**

SELECTED, REPORTED, AND ANNOTATED

**By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."**

VOL. XXXVIII.

**SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1894.**

**Entered according to Act of Congress in the year 1894,
By BANCROFT-WHITNEY COMPANY,
In the Office of the Librarian of Congress, at Washington.**

**SAN FRANCISCO:
THE FILMER-ROLLINS ELECTROTYPE COMPANY,
TYPOGRAPHERS AND STEREOTYPERS.**

AMERICAN STATE REPORTS.

VOL. XXXVIII.

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

	PAGE.
WEST VIRGINIA REPORTS Vol. 37.	17-74
ALABAMA REPORTS Vols. 96, 97.	75-216
ARKANSAS REPORTS Vol. 57.	217-270
CALIFORNIA REPORTS Vol. 100.	271-329
CONNECTICUT REPORTS Vol. 63.	330-393
MASSACHUSETTS REPORTS Vol. 159.	394-467
MINNESOTA REPORTS Vols. 51, 52.	468-569
MISSOURI REPORTS Vols. 116, 117.	570-689
NEBRASKA REPORTS Vol. 36.	690-761
NEW YORK REPORTS Vol. 141.	762-829
PENNSYLVANIA STATE REPORTS . . Vol. 158.	830-860
WASHINGTON REPORTS Vol. 7.	861-917

SCHEDULE

SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES
REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL
REPORTS MAY BE FOUND.

State reports are in parentheses, and the numbers of this series in bold-faced figures.

ALABAMA. — (83) 3; (84) 5; (85) 7; (86) 11; (87) 13; (88) 16; (89) 18; (90, 91) 24; (92) 25; (93) 30; (94) 33; (95) 36; (96, 97) 38.

ARKANSAS. — (48) 3; (49) 4; (50) 7; (51) 14; (52) 20; (53) 22; (54) 26; (55) 29; (56) 35; (57) 38.

CALIFORNIA. — (72) 1; (73) 2; (74) 5; (75) 7; (76) 9; (77) 11; (78, 79) 12; (80) 13; (81) 15; (82) 16; (83) 17; (84) 18; (85) 20; (86) 21; (87, 88) 22; (89) 23; (90, 91) 25; (92, 93) 27; (94) 28; (95) 29; (96) 31; (97) 33; (98) 35; (99) 37; (100) 38.

COLORADO. — (10) 3; (11) 7; (12) 13; (13) 16; (14) 20; (15) 22; (16) 25; (17) 31; (18) 36.

CONNECTICUT. — (54) 1; (55) 3; (56) 7; (57) 14; (58) 18; (59) 21; (60) 25; (61) 29; (62) 36; (63) 38.

DELAWARE. — (5 Houst.) 1; (6 Houst.) 22.

FLORIDA. — (22) 1; (23) 11; (24) 12; (25, 26) 23; (27) 26; (28) 29; (29) 30; (30) 32; (31) 34; (32) 37.

GEORGIA. — (76) 2; (77) 4; (78) 6; (79) 11; (80, 81) 12; (82) 14; (83, 84) 20; (85) 21; (86) 22; (87) 27; (88) 30; (89) 32; (90) 35.

IDAHO. — (2) 35.

ILLINOIS. — (121) 2; (122) 3; (123) 5; (124) 7; (125) 8; (126) 9; (127) 11; (128) 15; (129) 16; (130) 17; (131) 19; (132) 22; (133, 134) 23; (135) 25; (136) 29; (137) 31; (138, 139) 32; (140, 141) 33; (142) 34; (143, 144, 145) 36; (146, 147) 37.

INDIANA. — (112) 2; (113) 3; (114) 5; (115) 7; (116) 9; (117, 118) 10; (119) 12; (120, 121) 16; (122) 17; (123) 18; (124) 19; (125) 21; (126, 127) 22; (128) 25; (129) 28; (130) 30; (131) 31; (132) 32; (133) 36.

IOWA. — (72) 2; (73) 5; (74) 7; (75) 9; (76, 77) 14; (78) 16; (79) 18; (80) 20; (81) 25; (82) 31; (83) 32; (84) 35.

KANSAS. — (37) 1; (38) 5; (39) 7; (40) 10; (41) 13; (42) 16; (43) 19; (44) 21; (45) 23; (46) 26; (47) 27; (48) 30; (49) 33; (50) 34; (51) 37.

KENTUCKY. — (83, 84) 4; (85) 7; (86) 9; (87) 12; (88) 21; (89) 25; (90) 29; (91) 34; (92) 36.

LOUISIANA. — (39 La. Ann.) 4; (40 La. Ann.) 8; (41 La. Ann.) 17; (42 La. Ann.) 21; (43 La. Ann.) 26; (44 La. Ann.) 32.

MAINE. — (79) 1; (80) 6; (81) 10; (82) 17; (83) 23; (84) 30; (85) 35.

MARYLAND. — (67) 1; (68) 6; (69) 9; (70) 14; (71) 17; (72) 20; (73) 25; (74) 28; (75) 32; (76) 35.

- MASSACHUSETTS.**—(145) 1; (146) 4; (147) 9; (148) 12; (149) 14; (150) 15; (151) 21; (152) 23; (153) 25; (154) 26; (155) 31; (156) 32; (157) 34; (158) 35; (159) 38.
- MICHIGAN.**—(60, 61) 1; (62) 4; (63) 6; (64, 65) 8; (66, 67) 11; (68, 69, 75) 13; (70) 14; (71, 76) 15; (72, 73, 74) 16; (77, 78) 18; (79) 19; (80) 20; (81, 82, 83) 21; (84) 22; (85, 86, 87) 24; (88) 26; (89) 28; (90, 91) 30; (92) 31; (93) 32; (94) 34; (95, 96) 35; (97) 37.
- MINNESOTA.**—(36) 1; (37) 5; (38) 8; (39, 40) 12; (41) 16; (42) 18; (43) 19; (44) 20; (45) 22; (46) 24; (47) 28; (48) 31; (49) 32; (50) 36; (51, 52) 38.
- MISSISSIPPI.**—(65) 7; (66) 14; (67) 19; (68) 24; (69) 30; (70) 35.
- MISSOURI.**—(92) 1; (93) 3; (94) 4; (95) 6; (96) 9; (97) 10; (98) 14; (99) 17; (100) 18; (101) 20; (102) 22; (103) 23; (104, 105) 24; (106) 27; (107) 28; (108, 109) 32; (110, 111) 33; (112) 34; (113, 114) 35; (115) 37; (116, 117) 38.
- MONTANA.**—(9) 18; (10) 24; (11) 28; (12) 33.
- NEBRASKA.**—(22) 3; (23, 24) 8; (25) 13; (26) 18; (27) 20; (28, 29) 26; (30) 27; (31) 28; (32, 33) 29; (34) 33; (35) 37; (36) 38.
- NEVADA.**—(19) 3; (20) 19; (21) 37.
- NEW HAMPSHIRE.**—(64) 10; (62) 13; (65) 23.
- NEW JERSEY.**—(43 N. J. Eq.) 3; (44 N. J. Eq.) 6; (50 N. J. L.) 7; (51 N. J. L.; 45 N. J. Eq.) 14; (46 N. J. Eq.; 52 N. J. L.) 19; (47 N. J. Eq.) 24; (53 N. J. L.) 26; (48 N. J. Eq.) 27; (49 N. J. Eq.) 31; (54 N. J. L.) 33; (50 N. J. Eq.) 35.
- NEW YORK.**—(107) 1; (108) 2; (109) 4; (110) 6; (111) 7; (112) 8; (113) 10; (114) 11; (115) 12; (116, 117) 15; (118, 119) 16; (120) 17; (121) 18; (122) 19; (123) 20; (124, 125) 21; (126) 22; (127) 24; (128, 129) 26; (130, 131) 27; (132, 133) 28; (134) 30; (135) 31; (136) 32; (137) 33; (138) 34; (139) 36; (140) 37; (141) 38.
- NORTH CAROLINA.**—(97, 98) 2; (99, 100) 6; (101) 9; (102) 11; (103) 14; (104) 17; (105) 18; (106) 19; (107) 22; (108) 23; (109) 26; (110) 28; (111) 32; (112) 34; (113) 37.
- NORTH DAKOTA.**—(1) 26; (2) 33.
- OHIO.**—(45 Ohio St.) 4; (46 Ohio St.) 15; (47 Ohio St.) 21; (48 Ohio St.) 29; (49 Ohio St.) 34.
- OREGON.**—(15) 3; (16) 8; (17) 11; (18) 17; (19) 20; (20) 23; (21) 28; (22) 29; (23) 37.
- PENNSYLVANIA.**—(115, 116, 117 Pa. St.) 2; (118, 119 Pa. St.) 4; (120, 121 Pa. St.) 6; (122 Pa. St.) 9; (123, 124 Pa. St.) 10; (125 Pa. St.) 11; (126 Pa. St.) 12; (127 Pa. St.) 14; (128, 129 Pa. St.) 15; (130, 131 Pa. St.) 17; (132, 133, 134 Pa. St.) 19; (135, 136 Pa. St.) 20; (137, 138 Pa. St.) 21; (139, 140, 141 Pa. St.) 23; (142, 143 Pa. St.) 24; (144, 145 Pa. St.) 27; (146 Pa. St.) 28; (147, 150 Pa. St.) 30; (151 Pa. St.) 31; (148 Pa. St.) 33; (149, 152, 153 Pa. St.) 34; (154, 155 Pa. St.) 35; (156 Pa. St.) 36; (157 Pa. St.) 37; (158 Pa. St.) 38.
- RHODE ISLAND.**—(15) 2; (16) 27; (17) 33.
- SOUTH CAROLINA.**—(26) 4; (27, 28, 29) 13; (30) 14; (31, 32) 17; (33) 26; (34) 27; (35) 28; (36) 31; (37) 34; (38) 37.
- SOUTH DAKOTA.**—(1) 36.
- TENNESSEE.**—(85) 4; (86) 6; (87) 10; (88) 17; (89) 24; (90) 25; (91) 30; (92) 36.
- TEXAS.**—(68) 2; (69; 24 Tex. App.) 5; (70; 25, 26 Tex. App.) 8; (71) 10; (27 Tex. App.) 11; (72) 13; (73, 74) 15; (75) 16; (76) 18; (77; 28 Tex. App.) 19; (78) 22; (79) 23; (29 Tex. App.) 25; (80, 81) 26; (82) 27; (30 Tex. App.) 28; (83) 29; (84) 31; (85) 34; (31 Tex. Cr. Rep.) 37.

SCHEDULE

9

VERMONT. — (60) 6; (61) 15; (62) 22; (63) 25; (64) 33; (65) 36.

VIRGINIA. — (82) 3; (83) 5; (84) 10; (85) 17; (86) 19; (87) 24; (88) 29; (89) 37.

WASHINGTON. — (1) 22; (2) 26; (3) 28; (4) 31; (5) 34; (6) 36; (7) 38.

WEST VIRGINIA. — (29) 6; (30) 8; (31) 13; (32, 33) 25; (34) 26; (35) 29; (36) 32; (37) 38.

WISCONSIN. — (69) 2; (70, 71) 5; (72) 7; (73) 9; (74, 75) 17; (76, 77) 20; (78) 23; (79) 24; (80) 27; (81) 29; (82) 33; (83) 35; (84) 36.

WYOMING. — (3) 31.

AMERICAN STATE REPORTS.

VOL. XXXVIII.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Alabama etc. R. R. Co. v. Carroll..	<i>Conflict of laws</i>	97 Ala. 126.....	163
Allen v. Boston.....	<i>Sewers</i>	159 Mass. 324.....	423
Allen v. Buchanan.....	<i>Jurisdiction</i>	97 Ala. 399.....	187
Appeal of Crandall.....	<i>Wills</i>	63 Conn. 365.....	375
Arp v. State.....	<i>Juries</i>	97 Ala. 5.....	137
Barhight v. Tammany.....	<i>Malicious prosec'n</i> ..	158 Pa. St. 545...	853
Barlow v. Dahm.....	<i>Landlord and ten'nt</i> .	97 Ala. 414.....	192
Beggs v. Edison Electric etc. Co..	<i>Accounts</i>	96 Ala. 295.....	94
Bennett v. Bennett.....	<i>Husband and wife</i> ..	37 W. Va. 396..	47
Bloomer v. Nolan.....	<i>Infants</i>	36 Neb. 51.....	690
Board of County Commissioners v. Nelson.....	<i>Officers</i>	51 Minn. 79.....	492
Boyd v. Jones.....	<i>Debtor and creditor</i> .	96 Ala. 305.....	100
Brown v. Campbell.....	<i>Judgments</i>	100 Cal. 635.....	314
Catlett v. Railway Co.....	<i>Railroads</i>	57 Ark. 461.....	254
Chamberlain v. Hemingway.....	<i>Waters</i>	63 Conn. 1.....	330
Chipman v. Peabody.....	<i>Conflict of laws</i>	159 Mass. 420....	437
City of St. Joseph v. Union Ry. Co.	<i>Judgments</i>	116 Mo. 636....	626
Connecticut etc. Ins. Co. v. Smith.	<i>Fraud. conveyances</i> .	117 Mo. 261.....	656
Connell v. Western Union Tel. Co.	<i>Damages</i> '.....	116 Mo. 34.....	575
Copeland v. Phoenix Ins. Co.....	<i>Insurance</i>	96 Ala. 615	134
Covert v. Cranford.....	<i>Waters</i>	141 N. Y. 521....	826
Crandall's Appeal.....	<i>Wills</i>	63 Conn. 365....	375
Cravens v. Rossiter.....	<i>Deeds</i>	116 Mo. 338.....	606
Croom v. Chicago etc. Ry. Co....	<i>Railroads</i>	52 Minn. 296....	557
Cummings v. Powell.....	<i>Public lands</i>	116 Mo. 473.....	610
Cunningham v. Barnes.....	<i>Parent and child</i> ...	37 W. Va. 746...	57
Custy v. Donlan.....	<i>Limitations of act'ns</i> .	159 Mass. 245....	419
Dalton v. West End etc. Ry.....	<i>Judgments</i>	159 Mass. 221....	410
Dennis v. Spencer.....	<i>Intervention</i>	51 Minn. 259....	499
Derr v. Lehigh Valley R. R. Co..	<i>Conflict of laws</i>	158 Pa. St. 365..	848
Dexter v. Evans.....	<i>Trusts</i>	63 Conn. 58....	336
Douglas v. Stetson.....	<i>Mortgages</i>	159 Mass. 428....	442

NAME.	SUBJECT.	REPORT.	PAGE.
Drummond v. Crane.....	<i>Contracts</i>	159 Mass. 577....	460
Dunham v. Loverock.....	<i>Partnership</i>	158 Pa. St. 197...	838
Dyer v. Great Northern Ry. Co...	<i>Carriers</i>	51 Minn. 345....	506
Elledge v. National City Ry. Co..	<i>Master and servant</i> ..	100 Cal. 282.....	290
Evans v. Wall.....	<i>Parties</i>	159 Mass. 164....	406
Falls v. United States Savings etc. Co.....	{ <i>Conflict of laws</i>	97 Ala. 417.....	194
Finnegan v. Noerenberg.....			
First Nat. Bank v. Andrews.....	<i>Corporations</i>	52 Minn. 239....	552
Fleming v. Pittsburgh etc. Ry....	<i>National banks</i>	7 Wash. 261....	885
Force v. Gregory.....	<i>Negligence</i>	158 Pa. St. 130...	835
Fort Payne Furnace Co. v. Fort Payne Coal etc. Co.....	<i>Physic'ns and surg'ns</i> .	63 Conn. 167....	871
	{ <i>Receivers</i>	96 Ala. 472.....	109
Gaines v. Bard.....	<i>Master and servant</i> ..	57 Ark. 615....	266
Gates v. School District.....	<i>Master and servant</i> ..	57 Ark. 370....	249
Gavin v. Armistead.....	<i>Fraud. conveyances</i> ..	57 Ark. 574....	262
Gay v. Essex etc Ry.....	<i>Infant trespassers</i> ..	159 Mass. 238....	415
Gelatt v. Ridge.....	<i>Brokers</i>	117 Mo. 553....	683
Giles v. Miller.....	<i>Homestead</i>	36 Neb. 346....	780
Gillett v. Whiting.....	<i>Brokers</i>	141 N. Y. 71....	762
Grant v. Grant.....	<i>Wills</i>	63 Conn. 530....	379
Gunn v. White Sewing Machine Co.....	{ <i>Interstate commerce</i> ..	57 Ark. 24....	223
Handley v. State.....	<i>Homicide</i>	96 Ala. 48....	81
Hanson v. Bean.....	<i>Fraud. conveyances</i> ..	51 Minn. 546....	516
Heilbron v. Heilbron.....	<i>Mar'ge and divorce</i> ..	158 Pa. St. 297...	845
Henderson v. Nott.....	<i>Executions</i>	36 Neb. 154....	720
Herman v. Somers.....	<i>Vendor and purch'r</i> ..	158 Pa. St. 424...	851
Hodge v. State.....	<i>Homicide</i>	97 Ala. 37....	145
Hogan v. Kyle.....	<i>Vendor and purch'r</i> ..	7 Wash. 595....	910
Holden v. Starks.....	<i>Brokers</i>	159 Mass. 503....	451
Howell v. Alma Milling Co.....	<i>Appeal bonds</i>	36 Neb. 80....	694
Howland v. Inhabitants.....	<i>Mun. corporations</i> ..	159 Mass. 434....	445
Hughes v. Torgerson.....	<i>Mechanic's lien</i>	96 Ala. 346....	105
Hutchinson v. Ozark Land Co....	<i>Taxes</i>	57 Ark. 554....	258
In re Thompson.....	<i>Vagrancy</i>	117 Mo. 83....	639
Isham v. Post.....	<i>Banks</i>	141 N. Y. 100....	766
Johnson-Brinkman Commission Co. v. Central Bank.....	{ <i>Sales</i>	116 Mo. 558....	615
Jones v. State.....	<i>Criminal law</i>	97 Ala. 77....	150
Keyes v. Cyrus.....	<i>Homesteads</i>	100 Cal. 322.....	296
Kremer v. Chicago etc. Ry. Co....	<i>License</i>	51 Minn. 15....	468
Lamprey v. State.....	<i>Public lands</i>	52 Minn. 181....	541
Lanier v. McIntosh.....	<i>Mortgages</i>	117 Mo. 508....	676
Lawson v. Conaway.....	<i>Physic'ns and surg'ns</i> .	37 W. Va. 159...	17
Leonard v. Sparks.....	<i>Judgments</i>	117 Mo. 103....	646
Lewis v. State.....	<i>Homicide</i>	96 Ala. 6....	75

CASES REPORTED.

18

NAME.	SUBJECT.	REPORT.	PAGE.
Lincoln Nat. Bank v. Virgin.....	<i>Judgments</i>	86 Neb. 735.....	747
Lombard Investment Co. v. Carter.	<i>Vendor and purch'r.</i>	7 Wash. 4.	861
Lowe v. Woods.....	<i>Liens</i>	100 Cal. 408	801
Maroney v. Boyle.....	<i>Vendor's lien</i>	141 N. Y. 462....	821
McGuiness v. Butler	<i>Infant trespassers</i> ..	159 Mass. 233....	412
Merchants' Nat. Bank v. Citizens' Gas Light Co.....	<i>Corporations</i>	159 Mass. 505....	453
Minneapolis Co-operative Co. v. Williamson.....			
Minor v. Beveridge.....	<i>Brokers</i>	141 N. Y. 399....	804
Mitchell v. Bradstreet Co.....	<i>Libel</i>	116 Mo. 226.	592
Mitchell v. Donohue.....	<i>Wills</i>	100 Cal. 202	279
Montgomery v. Sayre.....	<i>Evidence</i>	100 Cal. 182	271
Moody v. Hamilton Mfg. Co.....	<i>Master and servant</i> .	159 Mass. 70.....	896
Moore v. Norman.....	<i>Tender</i>	52 Minn. 83.....	526
Muldoon v. Seattle etc. Ry. Co....	<i>Railroads</i>	7 Wash. 528....	901
Nelson v. Shelby Mfg. etc. Co....	<i>Vendor and purch'r.</i>	96 Ala. 515.....	116
Normille v. Gill.....	<i>Party-walls</i>	159 Mass. 427....	441
O'Toole v. Pittsburgh etc. R. R....	<i>Railroads</i>	158 Pa. St. 99....	830
Parrott v. Avery.....	<i>Deeds</i>	159 Mass. 594....	465
People v. Baker.....	<i>Forgery</i>	100 Cal. 188.....	276
People v. County of Glenn.....	<i>Constitutional law</i> ..	100 Cal. 419.	305
People v. Ewer.....	<i>Police power</i>	141 N. Y. 129....	788
People v. Munroe.....	<i>Forgery</i>	100 Cal. 664.....	323
People v. Shorb.....	<i>Officers</i>	100 Cal. 537.....	310
People v. Welch.....	<i>Jurisdiction</i>	141 N. Y. 266....	793
Phelps v. Simons.....	<i>Entireties</i>	159 Mass. 415....	430
Pioneer Sav. etc. Co. v. Bartsch...	<i>Judgments</i>	51 Minn. 474....	511
Pipkin v. Williams.....	<i>Fraud. conveyances</i> .	57 Ark. 242.....	241
Putnam v. Glidden.....	<i>Vendor and purch'r.</i>	159 Mass. 47.....	394
Quinby v. Slipper.....	<i>Mechanic's lien</i>	7 Wash. 475....	899
Railway Co. v. Cravens.....	<i>Carriers</i>	57 Ark. 112.....	230
Railway Co. v. Ferguson.....	<i>Railroads</i>	57 Ark. 16.....	217
Raisler v. Oliver.....	<i>Postmasters</i>	97 Ala. 710.....	213
Ransom v. High.....	<i>Partition</i>	37 W. Va. 838... ..	67
Riley v. Vaughan.....	<i>Husband and wife</i> ..	116 Mo. 169.....	586
Ritchie v. Waller.....	<i>Master and servant</i> .	63 Conn. 155....	361
Rollins v. Mitchell.....	<i>Husband and wife</i> ..	52 Minn. 41.....	519
Ruddick v. St. Louis etc. Ry. Co..	<i>Deeds</i>	116 Mo. 25.....	570
Russell v. McCall.....	<i>Partnership</i>	141 N. Y. 437... ..	807
Schanewerk v. Hoberecht.....	<i>Trust deeds</i>	117 Mo. 22.....	631
Seattle etc. Ry. Co. v. State.....	<i>Eminent domain</i> ...	7 Wash. 150....	866
Security Co. v. Eyer.....	<i>Conflict of laws</i>	36 Neb. 507.....	735
Seibert v. Minneapolis etc. Ry. Co.	<i>Intervention</i>	52 Minn. 148....	530
Singer Mfg. Co. v. Miller.....	<i>Innkeepers</i>	52 Minn. 516....	568
Skelly v. Bristol Sav. Bank.....	<i>Interest</i>	63 Conn. 83.....	340
Skinner v. Tirrell.....	<i>Subrogation</i>	159 Mass. 474....	447

NAME	SUBJECT	REPORT.	PAGE.
Sly v. Hunt	<i>Judgments</i> ..	159 Mass. 151....	403
Spellman v. Lincoln Rapid Transit Co.	<i>Street railways</i>	36 Neb. 890....	753
Springfield v. State.....	<i>Homicide</i>	96 Ala. 81.	85
State v. Duncan.....	<i>Witnesses</i>	7 Wash. 336...	888
State v. Milne.....	<i>Officers</i>	36 Neb. 301....	724
State v. Webb.....	<i>Corporations</i>	97 Ala. 111....	151
St. Joseph v. Union Ry. Co.	<i>Judgments</i>	116 Mo. 636	626
Sutton v. Morgan.....	<i>Vendor and purch'r.</i>	158 Pa. St. 204..	841
Taylor v. Bell.....	<i>Wills</i>	158 Pa. St. 651...	857
Thomson-Houston Electric Co. v. Palmer.....	<i>Pleading</i>	52 Minn. 174...	536
Thompson, In re.....	<i>Vagrancy</i>	117 Mo. 83	639
Trapnell v. Conklyn.....	<i>Married women</i>	37 W. Va. 242...	30
Union Freight R. R. Co. v. Winkley.....	<i>Carriers</i>	159 Mass. 133....	398
Wacek v. Frink.....	<i>Searchers of records</i> .	51 Minn. 282 ...	502
Ward v. Johnson.....	<i>Neg. instruments</i> ...	51 Minn. 480 ...	515
Waters v. Pioneer Fuel Co.....	<i>Master and servant</i> .	52 Minn. 474....	564
Watkins v. Landon.....	<i>Trade names</i>	52 Minn. 389....	560
Western Ry. v. Mutch.....	<i>Negligence</i>	97 Ala. 194....	179
Whipple v. Hill.....	<i>Attachment</i>	36 Neb. 720	742
White v. Pollock.....	<i>Deeds</i>	117 Mo. 467.	671
Wiley v. Seattle.....	<i>Mun. corporations</i> ..	7 Wash. 576...	906
Woodruff v. Marsh.....	<i>Charities</i>	63 Conn. 125....	346
Wren v. Wren.....	<i>Husband and wife</i> ..	100 Cal. 276.....	287
Wright v. Larson.....	<i>Chattel mortgages</i> ..	51 Minn. 321....	504
Wylie v. Grundysen.....	<i>Executions</i>	51 Minn. 360....	509
Youngberg v. Nelson.....	<i>Neg. instruments</i> ...	51 Minn. 172....	497

AMERICAN STATE REPORTS.
VOL. XXXVII.

CASES
IN THE
SUPREME COURT
OF
WEST VIRGINIA.

LAWSON v. CONAWAY.

[37 WEST VIRGINIA, 159.]

MALPRACTICE—EVIDENCE.—In an action against a physician for malpractice a witness who is well acquainted with the ability of the plaintiff to perform manual labor both before and since the injury was sustained is competent to testify to the inability of the plaintiff to perform such labor since his injury, as compared with his ability to perform it before the injury was received.

WITNESSES—COMPETENCY.—A party competent to prove the motives and intentions which have governed his conduct may state in general terms that he did, or refrained from doing, a certain thing on account of information received from third persons; but he cannot go into details as to conversations with third persons, not held in the presence or hearing of the opposite party.

PHYSICIANS AND SURGEONS—CARE AND SKILL REQUIRED OF.—A surgeon employed professionally to treat an injury is bound to use in his treatment a reasonable, ordinary degree of care and skill of the profession in his community, but he does not undertake to use the highest degree of care or skill, nor, in the absence of a special agreement, to perform a cure.

PHYSICIANS—DISMISSAL OF.—A patient may at any time discharge or dismiss his physician, and from that moment the physician is relieved from responsibility.

PHYSICIANS—MALPRACTICE—SUFFICIENCY OF COMPLAINT.—A complaint against a physician or surgeon charging that after having entered upon the treatment and cure of a patient he carelessly, negligently, and unskillfully conducted himself in that behalf, and that in consequence of such conduct the injury resulted, is sufficient to authorize a recovery for abandonment of his treatment by the surgeon.

PHYSICIAN AND PATIENT—DUTIES OF AND RELATIONS BETWEEN.—The employment of a physician to attend upon a sick person continues while the sickness lasts, and the relation of physician and patient continues unless it is ended by the consent of the parties, or revoked by the express dismissal of the physician; and the latter is bound to bestow such

reasonable, ordinary care, skill and diligence, as physicians and surgeons in the same neighborhood, and in the same general line of practice, ordinarily have and exercise in like cases. Time and locality are to be taken into account. In the absence of special agreement his engagement is to attend the case as long as it requires attention, unless he gives notice of his intention to discontinue his visits, or is dismissed by the patient; and he is bound to exercise reasonable and ordinary care and skill in determining when his attendance should cease. The mere failure to effect a cure does not raise a presumption of want of proper care, skill, and diligence. It is the duty of the patient to co-operate with the physician, and to conform to his prescriptions and directions, and if he neglects to do so he cannot hold the physician liable. On the other hand, the patient may rely upon the directions of his physician, and incurs no liability in doing so.

JUDGMENTS AS ESTOPPEL—PHYSICIANS—MALPRACTICE.—A judgment by default in favor of a physician in an action to recover for his services does not estop the latter from bringing his cross-action for malpractice; but if the patient appears in such suit he is bound to present all his defenses, and the judgment therein is an estoppel to a subsequent action for malpractice.

G. D. Smith and Stuart and Farr, for the appellant.

D. F. Pugh and H. M. Russell, for the appellee.

161 **LUCAS, P.** This was an action on the case for damages against a physician for malpractice. The plaintiff sued in the circuit court of Tyler county for ten thousand dollars damages, but the jury found for the defendant, and the court gave judgment. The plaintiff moved for a new trial, and took sundry exceptions, and the case comes before this court on the bills of exception reserved in the court below and made a part of the record. We will take these up in their order, and dispose of such of them as are material to the issue involved.

The first exception is to the ruling of the circuit court in excluding the following testimony of one C. W. Smith, called for the plaintiff: "Witness testified that he was well acquainted with the physical ability of the plaintiff to perform manual labor both before and since the breaking of his arm; that the said plaintiff, before the injury, was a strong, able-bodied man; that since he has been hurt the plaintiff has been unable to perform no more than one-half **162** a man's work; that witness had worked with plaintiff both before the arm was broken and since; that witness and plaintiff are both farmers, and live near together." We think that this was competent testimony, and was improperly excluded. It is the expression of neither an opinion nor a conclusion, but a

fact going to show the inability to work on the part of the plaintiff, as compared with his former condition, and was relevant and proper. In the form given it was certainly not very valuable testimony, but that was for the jury. Its relevancy and competency were unquestionable: 1 Greenleaf on Evidence, sec. 440.

The second bill of exceptions was taken because the court admitted the following testimony given by the defendant, E. B. Conaway, in his own behalf: "State whom you employed to treat plaintiff's arm after the fifth day of October, 1888? Answer: On the sixth day of October, 1888, A. Lawson came for me to go to see plaintiff, and I sent Dr. Smith to attend him. On October 11, 1888, I sent Smith again. Question by same: State what, if any thing, Dr. Smith told you plaintiff said to him (Smith) about coming back to see plaintiff on the visit of October 11, 1888? A. In the morning Dr. Smith told me that Lawson had discharged us—this was at my office, in Centreville, the morning after the visit—and that he wanted me to take a haystack on the bill."

The general rule is, where a party is competent to prove the motive and intentions which have governed his own conduct he may state, in general terms, that he did, or refrained from doing, a thing on account of information received from third persons; but he cannot go into details as to conversations with third persons, held not in the hearing of the opposite party.

In this case the witness could have stated that he refrained from paying another visit to the plaintiff, who was his patient, on account of information received from Dr. Smith, and this would have been competent. But the conversation itself, or the words of Dr. Smith, were incompetent. No injury can be perceived, however, inasmuch as Dr. Smith was himself called, and proved the conversation: 1 Greenleaf on Evidence, sec. 124.

¹⁶³ The third bill of exceptions embraces instruction No. 1 given for the defendant over the objection of the plaintiff. That instruction is as follows:

"Instruction No. 1: Gentlemen of the jury, it is claimed by the plaintiff that the defendant was employed to treat professionally, as a surgeon, his injured arm. By the defendant accepting the employment he bound himself to use in his treatment of the arm a reasonable, ordinary degree of care and skill of the profession in his community, but he did not

undertake to use the highest degree of care and skill, nor, in the absence of a special agreement, did he undertake to perform a cure. Nor can you infer that the defendant was negligent simply because a cure was not effected. The burden of proving his case by a preponderance of the evidence rests upon the plaintiff."

This instruction was substantially correct: *Kuhn v. Brownfield*, 34 W. Va. 256. The objection urged against it by counsel is that it uses the word "profession," instead of the more accurately descriptive term, "physicians in good standing." Perhaps the latter words would have been better, but I think we may say that the word "profession," used in this connection, is equivalent to "physicians and surgeons," and the qualifying words, "in good standing," are not generally inserted by the text-writers. For example, Mr. McClelland defines the contract as follows: "The implied contract of a surgeon is not to cure, but to possess and employ in the treatment of a case such reasonable skill and diligence as are ordinarily exercised in his profession by thoroughly educated surgeons; and, in judging of the degree of skill required, regard is to be had to the advanced state of the profession at the time." The author further adds the following qualifications: "Time and place must be taken into consideration. Reasonably, as much cannot be expected of physicians in remote localities, where he is cut off from opportunities of improvement, as from physicians living in communities where opportunity is afforded of seeing disease and accidents under more varied forms; nor from this latter class should as high a degree of attainments be exacted as from physicians connected with large hospitals, or who reside in ¹⁶⁴ large cities. If it were otherwise, we should find but few physicians except in populous communities. The very favorable rule has been laid down in the law that the least amount of skill, therefore, with which a fair proportion of the practitioners of a given locality are endowed, is taken as the criterion by which to judge the physician's ability or skill": McClelland on Civil Malpractice, 18, 19.

In the case of *Smothers v. Hanks*, 34 Iowa, 286, 11 Am. Rep. 141, the rule is laid down that the measure of skill and diligence "is that ordinarily exercised in the profession by the members thereof as a body; that is, the average of the reasonable skill and diligence ordinarily exercised by the profession as a whole."

The instruction is therefore, I think, couched in language substantially correct, and not calculated to mislead the jury.

Instruction No. 2 was excepted to by the plaintiff for the same reasons he urged against No. 1, and his objections have already been answered. The same may be said of instruction No. 3, which relates to the discharge of his physicians by the plaintiff. That instruction is as follows:

“Instruction No. 3: If the jury find from the evidence that the plaintiff, through Dr. W. A. Smith, on the eleventh day of October, 1888, discharged the defendant from the management and treatment of his arm, and if you further find from the evidence that prior to the eleventh day of October, 1888, the defendant and Dr. W. A. Smith exercised the ordinary care, skill, and diligence of their profession in their community in the management and treatment of the arm, then you must return a verdict for the defendant.”

All of the authorities admit that the patient may at any time discharge or dismiss his physician, and from that moment such physician is relieved from responsibility. It would be very strange if the law were otherwise.

The fourth instruction is as follows:

“If the jury believe, from the evidence, that the plaintiff, W. S. Lawson, by his own negligence, directly contributed in any degree to the injury sued for, they will find for the defendant.”

As an abstract proposition of law, this instruction might perhaps be correct; but, under the evidence set out in this record, I am inclined to think it ought not to have been given, ¹⁶⁵ except with modifications. Supposing the theory of the defense to have been correct—that the patient had dismissed his physician on the eleventh day of October, and that subsequent to that date the patient was negligent, would it be seriously contended that this neglect on his part would interfere with his right of recovery, provided he proved that the conduct and treatment of his physician up to the 11th of October had been utterly unskillful, and totally careless and negligent? I think not, and therefore the instruction, in the form propounded, was calculated to mislead, and should not have been given. So, also, if the physician, at a certain period, wrongfully abandoned his patient, and left him to his fate, any subsequent neglect on the part of the patient would not prevent his recovery. In other words, the contributory negligence must be contemporaneous with the main fact

charged as negligence, in order to prevent a recovery; and the instruction should have been so framed as to adapt it to the evidence, and to leave no room for misapprehension on the part of the jury.

The fifth instruction for the defendant is as follows: "Instruction No. 5: The jury are instructed that there is no issue in this case for them to consider as to whether Dr. Conaway or his agent abandoned the treatment of plaintiff's arm. The only issue is whether the defendant, Dr. Conaway, or his agent, Dr. Smith, failed to exercise the ordinary care and skill of their profession in their community while they treated the arm."

This instruction is plainly erroneous, and should not have been given. The charge in the amended declaration is that the defendant, after having been employed as physician and surgeon, entered upon the treatment and cure of the plaintiff, and so "carelessly, negligently, improperly, and unskillfully conducted himself in that behalf, and then and there so carelessly, negligently, improperly, and unskillfully applied his cure and treatment upon the said grievous hurts, broken bones, injuries, cuts, bruises, and fractures of the arm," etc., as to produce damage. The declaration further charges that injury resulted to the plaintiff "by means of the careless, negligent, improper, and unskillful attention" on the part of the defendant.

166 This, then, is the complaint and averment of the declaration; and it did charge and give full notice to the defendant that he was required to defend himself against a want of attention, which includes abandonment, almost as plainly as if that term had been used. Counsel have urged that abandonment was not charged in the declaration, and in support of their proposition cite us to the case of *Hawker v. Baltimore etc. R. R. Co.*, 15 W. Va. 628; 36 Am. Rep. 825; and *Bemus v. Howard*, 3 Watts, 255.

In the first of these cases the declaration charged that the engineer on a railway train saw the plaintiff's stock, and, after seeing it, so negligently conducted his train, etc., as to injure or kill it. Under this declaration this court refused to permit the plaintiff to prove that if the engineer did not see the stock it was his own fault and neglect, and that he ought to have seen it. Now, admitting this to be a correct decision (and I myself have always thought it too technical), that case has no application to the facts of the one we are

now considering. In the latter the averments of the declaration do, by necessary implication, cover the charge of abandonment as the equivalent of neglectful attention or want of attention. The language of the declaration carefully distinguishes between the unskillful treatment of the fracture and the negligent personal or professional conduct of the physician, and distinctly charges both species of negligence and carelessness.

The Pennsylvania case reported in 3 Watts, 255, to which we have been cited, is inapplicable, for the reason that if it be correctly stated by the court the declaration did not charge a want of attention on the part of the physician. At any rate, all we can say is, that if there is any thing in that case contrary to the views herein expressed upon the pleadings and evidence in the present case the former is manifestly wrong.

The ninth bill of exceptions embraces instruction No. 1, asked for by the plaintiff, which the court refused, and gave an instruction of its own in lieu thereof against the objection of the plaintiff's counsel. The instruction asked for and the modification are as follows: "Instruction No. 1: The court instructs the jury that it was the duty of the ¹⁶⁷ defendant, after entering upon the treatment of the plaintiff's fractured arm, to use all reasonable care and diligence in treating the injuries thereof, and that the plaintiff had a right to presume that the defendant had discharged his duty as such physician, and also had the right to rely upon the treatment, instructions, and directions given to him by the defendant."

To the giving of said instruction the defendant, by counsel, objected, which objection was sustained by the court; and the court, in lieu thereof, gave the following instruction, in the words and figures following, to wit: "No. 1: If the jury believe that defendant undertook the treatment of plaintiff's fractured arm as surgeon, it was his duty to bring to its treatment reasonable and ordinary care, skill, and diligence; and if the jury believe that the defendant failed to discharge such duty with ordinary skill and care and that the injury complained of resulted from such failure, without fault or negligence on the part of the plaintiff, which by ordinary care and prudence on his part could have been avoided, then defendant is liable."

It will be observed that the modified instruction given by the court has no relation to that asked for by the plaintiff,

and totally omits all reference to the point of law upon which the plaintiff was insisting. The instruction, in form, is not hypothetical, but the hypothesis, if framed, could only have included a fact which seems to have been taken for granted, and may be considered as a concession upon all hands, viz: that the defendant did actually enter upon the treatment of the plaintiff's fractured arm. If the instruction had said that, if the jury found the defendant entered upon the treatment of the plaintiff's fractured arm, then the defendant was bound to use all reasonable care, etc., and the plaintiff had a right to rely on instructions and directions, if any, given by the defendant, the proposition would have been correct, and the instruction unobjectionable in form.

I think there was no error in refusing the plaintiff's third instruction, because it fails to distinguish between the expenses and damages resulting from the original fracture and those consequent upon malpractice: *Field on Damages*, sec. 609; *Leighton v. Sargent*, 31 N. H. 119; 64 Am. Dec. 323.

¹⁶⁸ Before closing, it is perhaps necessary to define with more accuracy than we have yet done the implied contract between physician and patient, the violation of which on the part of the former constitutes malpractice.

When a physician is employed to attend upon a sick person, his employment continues while the sickness lasts, and the relation of physician and patient continues, unless it is put an end to by the assent of the parties, or is revoked by the express dismissal of the physician. The physician is bound to bestow such reasonable, ordinary care, skill, and diligence as physicians and surgeons in the same neighborhood, in the same general line of practice, ordinarily have and exercise in like cases. Time and locality are to be taken into the account, and the physician is bound to exercise the average degree of skill possessed by the profession in such localities. In the absence of special agreement, his engagement is to attend the case as long as it requires attention, unless he gives notice of his intention to discontinue his visits, or is dismissed by the patient, and he is bound to exercise reasonable and ordinary care and skill in determining when his attendance should cease. But his engagement is not to cure the patient, nor does he insure that his treatment will be successful. The mere failure to effect a cure does not even raise a presumption of a want of proper care, skill, and diligence. It is the duty of the patient to co-operate with the physician,

and to conform to his prescriptions and directions, and if he neglect to do so he cannot hold the physician responsible for the consequences of his own neglect. On the other hand, he has a right to rely upon the instructions and directions of his physician, and incurs no liability by doing so: McClelland on Civil Malpractice, 18, 19, 109; 14 Am. & Eng. Ency. of Law, 80, 82; 15 Am. & Eng. Ency. of Law, 439.

A feature in the case, yet to be noticed, is the fact that the plaintiff introduced a justice of the peace, who proved substantially, that for his services in this behalf the defendant recovered a judgment against the plaintiff. The docket or record, if it may be called such, of said justice, was before the jury, but seems to have been omitted intentionally from the record here. It is claimed in this court ¹⁶⁹ by counsel for defendant in error that this judgment against the plaintiff below estopped him from prosecuting his cross-action for malpractice. As the case will have to go back to the circuit court, we deem it our duty to decide this interesting question.

As a general rule, estoppel by a former judgment has to be introduced by a special plea of *res adjudicata*. No such plea was offered by the defendant in this case; but, on the other hand, the plaintiff himself introduced this record of the magistrate's court; and, if we had it before us, we should be able to decide whether the plaintiff had proved himself out of court—a privilege which he always has, and though his counsel, not unfrequently, though unwittingly, exercises.

The question involved is this: In a suit for malpractice, is the plaintiff estopped by a judgment in an action against him, brought by the physician, to recover compensation for services rendered in the same case. Upon this subject the decisions are much divided. In New York, in the leading case of *Gates v. Preston*, 41 N. Y. 113, and in *Bellinger v. Craigue*, 31 Barb. 534, the affirmative was held, and such has been the uniform current of decision in that state: *Blair v. Bartlett*, 75 N. Y. 150; 31 Am. Rep. 455; *Dunham v. Bower*, 77 N. Y. 76; 33 Am. Rep. 570; New Jersey, Arkansas, and perhaps other states, have followed the New York decision: *Ely v. Wilbur*, 49 N. J. L. 685; 60 Am. Rep. 668; *Dale v. Donaldson Lumber Co.*, 48 Ark. 188; 3 Am. St. Rep. 224. Upon the other hand, in Indiana, Ohio, Wisconsin, and perhaps other states, a contrary doctrine has been held: *Goble v. Dillon*, 86 Ind. 327; 44 Am. Rep. 308; *Sykes v. Bonner*, 1 Cin. Rep. 464; *Ressequie v. Byers*, 52 Wis. 650; 38 Am. Rep. 775.

The dividing line between the New York decisions and those of the states which have taken a contrary view is upon the fact whether the judgment obtained by the physician was a judgment by default; for all the cases concede that if the patient has appeared, and defended the action on the ground of neglect or want of skill, the judgment against him is an estoppel, and he cannot bring his cross-action for malpractice. But when the judgment is by default, and no defense whatever has been made, the majority of the cases would seem to hold that the question of malpractice ¹⁷⁰ or diligence and skill was not involved, and that the patient has not impaired his right of action by neglecting or refusing to appear to the suit against him.

Finding this contrariety of opinion in the courts of last resort, we naturally recur to the text-writers to ascertain how the scale ought to be adjusted, and what held to be the better opinion. But, instead of resolving our doubts, we find the conflict renewed with an energy almost acrimonious in its vigor. We find that Mr. Bigelow (1886) dissents from the New York decisions upon the ground that the right to sue for malpractice was a cross-demand, and the defendant might elect to litigate it in the first suit, but if he declined to do so it was reserved to him for future action. On page 175 of Bigelow on Estoppel he thus comments upon the New York decisions:

“Such an argument, however, like the view taken by the courts of New York, that the former judgment has shown that the services or property, according to the case, were of value, while the second suit declares, or may declare, the same to be worthless, is only plausible; for a judgment on default is not equivalent in principle or on authority, to a judgment on an issue fought out. Judgment on default is good for the primary purpose of a judgment for plaintiff. It gives him the right to have the sum adjudged collected. But it has not the full effect of a *res judicata*, because in reality it has been *ex parte*. There is the best authority for saying that judgment by default does not conclude defenses in confession and avoidance in a different action. And if the view here presented, that the cross-demand is an independent cause of action, is correct, it cannot matter that the former judgment was rendered upon an issue contested, if that issue did not embrace the cross-demand.”

Upon the other hand, Mr. Herman (1886) takes the oppo-

site view, and denies that the action for malpractice can be, in strict legal sense, a counterclaim, and hence it cannot, he argues, in the absence of statutory regulations, be the subject of an independent action: 1 Herman on Estoppel, sec. 235. In section 236 he states his argument, in earnest and vigorous language, as follows:

171 "Courts maintaining a doctrine contrary to that of *Gates v. Preston*, 41 N. Y. 113, do so, except where otherwise compelled by statute, by violating every principle on which the doctrine of *res adjudicata* is founded. Without citing again the long and unbroken line of cases which will be found in another portion of this work, we may state the following as the substance of the decisions: 1. The maxim, *interest reipublicæ ut sit finis litium*, has never yet been questioned; and, 2. Whenever, a matter is adjudicated, such judgment decides every matter which pertains to that cause of action, or the defense set up, or which is involved in the measure of relief to which the cause of action or defense entitles the party, even though such matter may not be set forth in the pleadings so as to admit proof and call for an actual decision upon it. This principle prevails throughout the civilized world, with but few exceptions, and includes, not only what actually was determined, but also extends to every other matter which, under the issues, the parties might have litigated in the case—to everything within the knowledge of the parties which might have been set up as a ground of relief or defense. This principle is but the repeated reiteration of the maxim above cited, which is so deeply fixed in the law of fundamentals. This maintenance of this principle is one of the necessities in all civilized communities, and it has been handed down, from generation to generation, without ever being questioned, until the present time; and we doubt whether there ever can be a so well-established and universally sustained principle of law. A court that cannot doubt, distinguish, or make an exception to a well-settled rule of law is among the impossibilities of this age. The case of *Gates v. Preston*, 41 N. Y. 113, follows the universal rule above cited. In the early case of *Marriot v. Hampton*, 7 Term Rep. 269, it was held that where, in an action, a party had a complete defense, as payment, and failed to maintain it, he was concluded by that judgment, and, although he had the written receipt of the plaintiff, yet he was compelled to pay the same money twice. This principle

has never been questioned. So a party having a defense like that of usury, limitation, and coverture, a statutory right of exemption, or any defense which will defeat a plaintiff's claim, and fails to ¹⁷³ set up such defense, cannot thereafter relitigate matter which would have defeated the plaintiff's action in another cause between the same parties by simply reversing their positions as parties."

A later writer (1891) as umpire in the dispute between Herman and Bigelow, decides against the New York view, and supports the western cases as having the better reason: 2 Black on Judgments, sec. 769.

"Thus, where a physician sued a party for services rendered by him in treating a broken limb, and the defendant appeared and pleaded general denial, it was held that the fact of performance of plaintiff's contract was impliedly averred and denied by the pleadings, and that a judgment in favor of the plaintiff for the services as claimed necessarily included the fact of due performance by the plaintiff, and that the question of malpractice was involved in the issue, and concluded by the judgment, so that the patient could not thereafter sue upon that cause of action. And a similar rule has been applied in Massachusetts, though the services were of an entirely different nature, where defense was taken to the first action on the ground of negligence, but without seeking to recoup the damages. But these cases have been vigorously criticised and resolutely denied in decisions rendered in other states, which seem to us to be much better supported by legal reason and the best considerations of convenience and justice. This may be illustrated by the judgment in the case of *Ressequie v. Byers*, 52 Wis. 650, 38 Am. Rep. 775, where, after an action was commenced for malpractice in attendance upon a certain case, defendant instituted a suit before a justice of the peace for the value of his services for such attendance, in which suit the defendant interposed a general denial as to the value of the services, but afterwards failed to appear at the trial, and judgment was given for the physician for the amount he claimed. It was held that such judgment was no defense to the action for malpractice, and a supplementary answer setting it up as a plea in bar was demurrable."

Amidst this great contrariety of opinion, we must draw our conclusions in conformity with the spirit of our own decisions, and according to the dictates of a sound adherence ¹⁷³ to general principles. No court has insisted more strenuously

upon the doctrine of *res judicata* than has our own: *Western M. & M. Co. v. Virginia C. C. Co.*, 10 W. Va. 250; *Henry v. Davis*, 13 W. Va. 230; *Corrothers v. Sargent*, 20 W. Va. 351; *Mason v. Harper's Ferry Bridge Co.*, 20 W. Va. 223; *Wandling v. Straw*, 25 W. Va. 692; *McCoy v. McCoy*, 29 W. Va. 794; *Seabright v. Seabright*, 33 W. Va. 152; *Parsons v. Riley*, 33 W. Va. 464; *Sayre v. Harpold*, 33 W. Va. 553.

Nevertheless, I think a safe conclusion to be reached is that if the physician sue for compensation for his services, and there is no appearance by the patient, a recovery by the former does not estop the latter from bringing his cross-action for malpractice; but if he appear (unless the record show that it was not to defend, but solely to disclaim the waiver of his own right) he is estopped by the recovery. The right to sue for malpractice is both a defense and a subject for cross-action, and if used for either purpose—that is, either by way of defense or recoupment—it destroys the vitality of the claim, if sought to be used in an independent action; and if the patient has appeared in the suit by the physician he was bound to make all the defenses he had, and hence he is estopped by the fact that he had a defense of malpractice, of which he failed to avail himself. But if he has not appeared, then the question of malpractice has never been adjudicated, and he is at liberty to assert his claim by an independent action.

For the reasons stated the judgment of the circuit court must be reversed, the cause remanded, the verdict set aside, and a *venire de novo* awarded, and in the new trial the circuit court will conduct its proceeding in accordance with the principles herein announced.

Reversed. Remanded. —

HOLT, J., dissented as to that part of the opinion relating to estoppel by judgment, and said: "The malpractice described in plaintiff's declaration is a common-law tort, and properly made the subject of an action in case. But because it is a tort which results from a breach of duty, and relating to and growing out of the services of Dr. Conaway as a surgeon, for which service Lawson had agreed expressly or impliedly to pay, it may, at Lawson's option, be filed as a recoupment against the surgeon's suit for his services. But Lawson is not compelled to put it in by way of recoupment or counterclaim, on pain of being thereafter barred by the judgment in the action for such services. Our practice is to leave this to the choice of Lawson, so that he may act upon such considerations of fitness, convenience, and the like, as the circumstances of the case may dictate in regard to the time and the mode of enforcing his claim for damages."

PHYSICIANS AND SURGEONS.—SKILL AND CARE REQUIRED OF: See *Barney v. Pinkham*, 29 Neb. 350; 26 Am. St. Rep. 389; *Du Bois v. Becker*, 130 N. Y. 325; 27 Am. St. Rep. 529, and the cases and notes referred to in the note to *State v. Housekeeper*, 14 Am. St. Rep. 343. To recover damages for unskillfulness or negligence it is not necessary to prove gross culpability on the part of the physician: *Link v. Sheldon*, 136 N. Y. 1. An instruction that "ordinary skill" is the skill which a surgeon would, under the circumstances of the case, reasonably use in treating the case, will, in the absence of a prayer for a more explicit instruction, be held sufficient on appeal: *Boon v. Murphy*, 108 N. C. 187. The burden is on the plaintiff to show that the evil results of which he complains were caused by the unskillful treatment of the physicians: *Pettigrew v. Lewis*, 46 Kan. 78. For a case in which the plaintiff had sustained an unusual kind of fracture of the wrist, and a verdict in his favor was set aside on the ground that, although recovery was not complete, the physician had not been guilty of negligence, see *Stevenson v. Gelathorpe*, 10 Mont. 563. Where there is no special contract defining the nature and extent of the physician's undertaking, he may be sued either in *assumpsit* or case: *Kuhn v. Brownfield*, 34 W. Va. 252.

JUDGMENTS—RES ADJUDICATA.—Besides the cases from the series cited in the opinion, reference may be made to *Davenport v. Hubbard*, 46 Vt. 200, 14 Am. Rep. 620, where it was held that judgment by default for the price agreed on for certain work was no bar to an action to recover damages for the failure of the party in whose favor that judgment had been rendered to complete the work within the stipulated time; and to *Garrard v. Dollar*, 4 Jones, 175, 67 Am. Dec. 271, where it was held that judgment by default precludes a party from using, for the purpose of reducing damages, any testimony which would have defeated the action had a plea in bar been interposed.

TRAPNELL v. CONKLYN.

[87 WEST VIRGINIA, 242.]

MARRIED WOMEN—SEPARATE ESTATE.—Property, real or personal, purchased by a married woman from a stranger, on credit, becomes her separate estate, although she pays for it out of the profits arising from her use thereof, whether she antecedently had any separate estate or not.

MARRIED WOMEN—SEPARATE ESTATE.—Profits produced by the skill and labor of a married woman in the use of her separate estate while living with her husband are a part of such estate, and not earnings belonging to her husband.

MARRIED WOMEN—SEPARATE ESTATE—PROFITS FROM HUSBAND'S LABOR. The mere fact that an insolvent husband devotes his time and labor upon his wife's separate estate, and profit results therefrom, does not, in the absence of fraud, make such profits his property, nor render them liable for his debts. If, after the support of the family is provided for, a surplus of profits still remains, equity, in proper cases, divides the surplus between the wife and the husband's creditors.

MARRIED WOMEN—SEPARATE ESTATE—PROFITS TO WHOM BELONGS.—Mere participation by the husband in the production of profits out of the wife's separate estate does not make them liable to his creditors, while

the husband and wife are living together, without regard to the support of the family. If, in such cases, substantial property, traceable to the skill and labor of the husband, is found to exist, courts of equity will make a just apportionment thereof between the wife and her husband's creditors.

MARRIED WOMEN—SEPARATE ESTATE—HUSBAND AS AGENT.—A married woman with separate estate may barter and trade with reference thereto by her husband as agent, and she will still be entitled to the increase thereof. The marital relation does not prevent nor disqualify the husband from acting as his wife's agent with reference to her separate estate, nor will his agency render her property or its profits liable to his creditors.

PARENT AND CHILD—CHILD'S EARNINGS WHEN NOT LIABLE FOR PARENT'S DEBTS.—Although a minor son's services and earnings belong to his father, and are liable for his debts while he supports him, yet an insolvent father may emancipate his son, and the latter's earnings then belong to him, to dispose of as he pleases, free from the claim of the father's creditors.

PARENT AND CHILD—EARNINGS OF CHILD WHEN NOT LIABLE FOR PARENT'S DEBTS.—The fact that the minor son of an insolvent father labors on the separate estate of the wife, with the father's consent, for the maintenance of the family, does not render the products of such estate liable for the father's debts.

MARRIED WOMEN—SEPARATE ESTATE.—WIFE'S CHOSES IN ACTION, not reduced to his possession by the husband before a statute takes effect vesting such choses in the wife as her separate estate, cannot thereafter be reduced to his possession by the husband or his creditors.

MARRIED WOMEN—SEPARATE ESTATE—DECLARATIONS OF THE HUSBAND. As between a husband's creditors and his wife, claiming the property in dispute as her separate estate, the declarations of the husband as to the ownership of the property are not admissible as against the wife.

Cleon Moore and J. J. Williams, for the appellant.

Forrest W. Brown and J. F. Engle, for the appellee.

243 BRANNON, J. Personal property was levied upon as property of James H. Conklyn, under executions against him and his wife, and Susan C. Conklyn, claiming it; and a trial was had by a jury in the circuit court of Jefferson county, under code, chapter 107, sections 1, 5, 6, to settle the right thereto between Mrs. 244 Conklyn and Trapnell and Croft, use, etc., the execution creditors, resulting in a verdict finding part of said property to be the property of said James A. Conklyn. From the judgment carrying said verdict into execution Mrs. Conklyn obtained this writ of error.

The real merits of the case are involved in the motion of Mrs. Conklyn to set aside the verdict, because contrary to the evidence, which was overruled.

James H. Conklyn, becoming involved, on March 28, 1885,

surrendered all his land and personalty, except seventy-five dollars household goods, the estate conveyed being very considerable in amount, to his creditors by a deed of trust, under which, on April 20, 1885, the trustee sold the personal property, and in August, 1885, sold the farm, on which Conklyn resided, eighty-one acres. Daniel Hefflebower, who is the brother of Mrs. Conklyn, purchased said farm for his wife, and it was paid for out of her separate estate. Daniel Hefflebower bought at the trustee's sale the wheat growing upon said eighty-one acres for his sister, Mrs. Conklyn; also a roan mare, at the price of three hundred and fifty-one dollars and sixty-four cents, for the purpose of furnishing his sister with means to farm; and, acting for his wife, Hefflebower leased the farm to his sister, Mrs. Conklyn, after he purchased it. Hefflebower sold the wheat and mare and colt to Mrs. Conklyn on credit at the same price he paid, and afterwards she cut the said wheat, and out of it partly paid for it and the mare and colt.

Mrs. Nancy Conklyn, mother of James H. Conklyn, in December, 1884, leased for no definite time another tract of land, which he on becoming insolvent turned over to his wife to be farmed, and which was farmed by her in connection with and in the same manner as the eighty-one-acre farm.

Mrs. Susan C. Conklyn, while living with her husband, to some extent with his assistance and the assistance of her son, about eighteen years of age, and of a hired man, in 1885 put out a corn crop on both said tracts of land, using, with the trustee's consent, until the 29th of April the horses and farming implements of James H. Conklyn conveyed in said deed of trust.

245 While Mrs. Conklyn was farming she had the help of farming implements and horses lent to her by her brother, Daniel Hefflebower, and other assistance from him. He gave her five hogs to stock the farm. Thus equipped, she began farming both farms, the son, with the father's consent, working the farms with hands hired from time to time, and paid for out of the proceeds of the farm, the son having no contract, but receiving from time to time such amounts of money as could be spared, amounting to one hundred and fifty dollars, including clothing.

The husband was absent much of the time, selling machinery on commission for a firm, and for many months physically and mentally incapacitated by disease for work or business to

any extent, and for a time in a hospital. When at home, and not incapacitated, he gave some help on the farm, and to some extent assisted the wife and son in superintending and managing it. He acted generally as his wife's agent in selling and buying, but the son and Mrs. Conklyn's brother frequently took part.

From the proceeds of the farm so operated, and on credit given to her by it, the operating expenses, household expenses, and such articles as stock and other things as were needed were provided from time to time. At a sale of John Benner in March, 1886, a black mare was bought by Hefflebower for his sister, for one hundred and thirty-seven dollars, on which was credited forty-one dollars, the price of a colt of hers which has been sold at said sale, and its price taken up in the bill; and for ninety-six dollars, the balance James H. Conklyn gave his note as his wife's agent, indorsed by Hefflebower, and paid by him when due. In March, 1887, at a sale of Colonel Gibson's, Hefflebower purchased for his sister a bay horse, for which her husband as her agent gave his note, indorsed by Hefflebower, which was paid when due by young Conklyn, the son above mentioned, with Hefflebower's check for one hundred dollars to young Conklyn, lent by Hefflebower to his sister on the son's request, by his mother's direction; and the balance was paid by the son with money furnished by the mother.

On loans and the sale of said property by Hefflebower to his sister payments were made from time to time out of ~~246~~ the proceeds of the farm, and out of them and other transactions grew an account on which a balance remained unpaid, estimated to be some seventy-five dollars.

The property levied on was derived as follows: The sorrel colt was the foal of the mare bought at Benner's sale. Two colts were descendants of the roan mare, sold at the trustee's sale and the bay horse bought at Gibson's sale. A wagon was bought by James H. Conklyn, as agent for his wife, on credit, and paid for out of money supplied by the wife out of a payment by Daniel Hefflebower, as executor of his father, upon a legacy of three hundred dollars to Mrs. Conklyn under the will of her father, probated in 1867, which money was paid her in 1890. The hogs were the increase of those given to Mrs. Conklyn by her brother in 1885. A horserake was bought on the credit of the farm and paid for out of its proceeds. Crops levied on were raised on the farms in 1890, in

the manner aforesaid. The verdict relieved the hogs and wagon from the execution.

At the date of the sale by the trustee, Mrs. Conklyn had no separate estate save the three hundred dollars legacy under her father's will.

The theory upon which it is claimed that all the property found by the jury to be property of James H. Conklyn and liable for his debts was his, is that at the start, the date of the sale of his property under the deed of trust, Mrs. Conklyn had no separate estate whatever; that she purchased the personal property purchased at the sale by her brother of him wholly on credit; that the property and its increase cannot be regarded as the wife's, because it started with no separate basis, was not acquired with a separate estate; that something cannot come from nothing, so to speak, and a separate estate cannot arise from mere credit to the wife not based on separate estate; that the personal property was paid for out of the issues of the farms, which were produced by farming operations by the labor of the husband and his infant son, which of right belong to the creditors; and so far as that labor may be said not to have produced such proceeds, or even if they had not contributed thereto, as the farm was operated by the wife, its proceeds are to be regarded as the wife's earnings, belonging by law to the ²⁴⁷ husband; and thus neither the property nor crops would be hers.

We can say on the facts certified as facts, that, when Daniel Hefflebower purchased property sold at the trustee's sale paying to the creditor's use, he became *bona fide* owner of it and sold it to his sister, Mrs. Conklyn. But it was sold on credit, and it is said separate estate cannot arise from the wife's credit, but, if a purchase, it must be made with her separate estate.

There are decisions in Pennsylvania that a purchase by a married woman purely on credit, she having no separate estate, is but an acquisition by a married woman, and at the instant of the purchase it becomes the husband's property, even though it be paid for out of its own proceeds; but the current of authority and reason do not sustain this position. By the sale the title passes to the wife, not to the husband, for he is not a party to it. Under common law it would vest in him; but our statute broadly and unconditionally says that a married woman may take from any one save her husband, and hold to her sole use, any property, as if she were single.

Under a purchase by a single woman she would be vested with legal title. The statute gives the wife capacity to take and hold as if single. Whence does the husband acquire title? The common law on this point has been swept away. Where is the law that gives the man the title? We find one to give the woman title in code, chapter 66, section 3.

Mr. Bishop, with that strength of reasoning and analysis which characterizes all his law works, probes this matter to the bottom, and maintains the view that it is her separate estate. He says:

"If a third person makes a gift to the wife of property, real or personal, it, at the common law, is an acquisition of which she is deemed the meritorious cause, and the thing given vests in the husband or wife, or both, according to the same rules as any thing else coming to her during the coverture. Now, suppose the third person, when he makes the gift, takes a promise of the wife to pay, binding in morals, not in law; plainly, in legal reason, this can make no difference. If, afterwards, another third person, not the ²⁴⁸ husband, makes good the wife's promise by paying the money, that can make no difference; and in such a case, if the vendor has merely agreed to convey the property to the wife, and has not conveyed, his undertaking, though the contract was void as to her by reason of the coverture, binds him. In these cases, surely, under our statutes, the property is the wife's, though bought on credit, the same as though it came in any other way. Then, again, suppose the vendor has chosen to vest the title in her before receiving any money, and the wife, by using the property in some way permitted by the statute, has accumulated the money to pay for it; this money is plainly her separate estate, and such the property will continue to be after her honorary obligation to make payment is discharged":
2 Bishop on Married Women, section 88.

The court of appeals of New York in *Knapp v. Smith*, 27 N. Y. 277, holds, that under the statute the married woman may acquire property, real or personal, by buying on credit, and no interest therein would pass to the husband, whether she antecedently had any separate estate or not; that if the vendor would take the risk of payment the transfer would be perfect; that she could hold the property, manage it by the agency of her husband, or any other, and hold the profits and increase to her separate use. It so held where the wife of an insolvent bought cattle which had been his from his

assignee, giving her note for the price, and purchased the farm for the conveyance of which her husband had a contract, and she mortgaged it for the price, and subsequently employed the husband as her agent to manage the farm, the case being free from fraud. Similar doctrine has been held in *Shields v. Keys*, 24 Iowa, 298.

The married woman who bought on credit the debts of her husband secured by his deed of trust on his goods was said, in the opinion of *Williams v. Lord*, 75 Va. 403, to take a good title as separate estate, though she might pay for them out of the proceeds of the sale.

Robinson v. Neill, 34 W. Va. 128, was a purchase on credit by a *feme* without separate estate, except a few articles which did not go into the land, and it was held that the land and its issues, and property purchased ²⁴⁹ with such issues, were separate estate. Both opinions, particularly that of Judge Lucas, held this. The question that a credit purchase would prevent its being separate estate was, it is true, not pointedly considered, but the opposite theory was sustained. The point was not even questioned: *Atwood v. Dolan*, 34 W. Va. 563; *Welsh v. Solenberger*, 85 Va. 446; *Keller v. Mayer*, 55 Ga. 406, and other instances. See Wells on Married Women, secs. 240, 241, 246.

But it is said that the husband is entitled to the wife's earnings (*Bailey v. Gardner*, 31 W. Va. 94, 13 Am. St. Rep. 847, *Campbell v. Bowles*, 30 Gratt. 652), and therefore, as she carried on business, the results are her earnings, and the crops and property paid for by them are liable, because the wife contributed in their production. If so, then why does the statute empower her to hold separate estate? Simply that the estate should lie idle and unproductive? If she could get some one else to manage her separate estate, I assume the profits would be hers. Or would they still be earnings, and belong to her husband? Assuming that in such case such profits would be hers, is the result changed by the fact that she has capacity and industry to manage the estate so as to yield profits? I think not. Though profits arising from the use of her separate estate be in any measure the result of her skill and labor, they are still hers. Without asserting her right to engage generally in business, I think the true view is that, while the common law does give the husband right to the wife's services and earnings, yet that is modified by the act giving her power to hold separate estate and its issues.

and profits, to the extent that when her skill and labor in the use of separate estate do produce profits they are hers, not earnings belonging to the husband: See Wells on Married Women, 178; *Glover v. Alcott*, 11 Mich. 482; *Atwood v. Dolan*, 34 W. Va. 583, opinion; *Henderson v. Warmack*, 27 Miss. 835.

Penn v. Whitehead, 17 Gratt. 503, 94 Am. Dec. 478, before the statute, recognized her right to engage in business, and gave her its results. So it cannot be because of any use of the wife's time, skill, and industry in the use of this property returning a profit that they are liable to the husband's creditors.

²⁵⁰ But the question may be asked, how can this married woman, living with her husband, carry on business in view of section 13, chapter 66, of the code (ed. 1887), providing that a married woman living separate and apart from her husband may carry on any trade or business, and the property used in it and its profits and her earnings shall be her separate estate? Does not this exclude wives living with their husbands from carrying on business, from the fact that it limits that privilege to those living separate from their husbands?

This construction would be only inferential, as there is no positive prohibition. This section has no application to wives living with their husbands owning separate estates, but relates only to those unfortunate wives separated from their husbands. Without this statute the common law would rob the poor wife abandoned by her husband of all property coming from her toil, and of her hard earnings necessary to her very existence, and give them to the drunken husband himself, whenever he should claim them; and her employer could not even pay her wages free from his claim, and his creditors might claim property acquired by her in business, and she could not carry on business necessary for her support, because she could not contract, as her contracts would be void.

To remedy such evil this statute was passed. It was not intended to trench on the right already existing of a married woman to use her separate estate and enjoy its profits. Under this section her property and earnings are the woman's, and by implication she has power to contract: *Peck v. Marling*, 22 W. Va. 708. I speak of this section as it was before chapter 109, Acts 1891.

But it is contended that as the husband rendered some assistance in the conduct of farming, that renders the crops and the other property paid for out of them liable to his debts. Elaborate discussions of this subject are to be found in the text-books and reports, and in our own court it has received full consideration in *Miller v. Peck*, 18 W. Va. 99, and *Atwood v. Dolan*, 34 W. Va. 563. The husband cannot be compelled to labor for his creditors. There are cases where the creditors can subject an accumulation ²⁵¹ of property, the result distinctly of the husband's labor and talents in connection with her separate estate or an apportionment; but, generally speaking, as a man is entitled out of his own labor to the bread of life first, and is under obligation to support his wife and family, the courts, from the necessity of the case, have felt themselves constrained to say that from the mere fact that a husband devotes his time and labor upon his wife's separate estate, and profits result, such profits do not go to him or his creditors; for, if so, he and his wife and children would in most cases, where his wife has a little home coming from some kinsman, and he hopelessly insolvent, starve: *Miller v. Peck*, 18 W. Va. 99; *Atwood v. Dolan*, 34 W. Va. 563; *Gage v. Dauchy*, 34 N. Y. 293; *Knapp v. Smith*, 27 N. Y. 277.

A husband in the enjoyment of marital right lives and is maintained on wife's land, which she manages for her use, and he voluntarily bestows labor upon it. This was held not to give him or her creditors right to crops: *Rush v. Vought*, 55 Pa. St. 437; 93 Am. Dec. 769. See opinion in *Hamilton v. Booth*, 55 Miss. 60; 30 Am. Rep. 500.

In *Feller v. Alden*, 23 Wis. 301, 99 Am Dec. 173, it is held that a wife may cultivate her land by means of the labor of her husband and their minor children without divesting herself of its products so as to subject them to execution against the husband, and it is not proof of an arrangement to defraud creditors.

In Kentucky the court held that products of a wife's farm, through the labor and skill of the husband, follow the title to the land and are hers, though not if his services exceeded in value the cost of support of himself and family, the obligation of that support being held paramount to that of paying his debts; and until he made provision for that obligation the products of her farm could not be made liable to his debts, and not then unless it was shown that the part not needed for the

support of himself and family was the result of his labor: *Commonwealth v. Fletcher*, 6 Bush, 171, 172.

Mr. Bishop in 2 Bishop on Married Women, section 301, takes issue with the Kentucky court in saying that the surplus after support might be reached, saying it could not be unless there was an agreement to pay him the excess.

252 The husband is bound to support himself and family, including his wife, and she is not bound to support even herself to his relief, even if she have separate estate: 1 Bishop on Married Women, sec. 57; 2 Bishop on Married Women, secs. 72, 158, 159; Wells on Married Women, 135. This debt on the husband is prior and paramount to every money debt to others, from the very nature and necessity of the case; neither he nor wife nor family ought to starve or be pinched with want to pay mere money debts. No just law can underrate this great and high debt to obligations of mere money.

Courts will not allow husband and wife to use this right to cloak fraud against creditors, but will ferret out the fraud with very suspicious and acute eye, so far as human testimony will enable them to do so, failing sometimes, it is true, for want of evidence, but generally succeeding in doing justice in cases of real fraud; but they will not, by an unbending iron rule, hold in every case that mere participation by the husband in the production of profits out of the wife's lands or other property will make them liable to creditors, and impose starvation on the whole family. No slavery could be more oppressive and hard than such slavery of unfortunate debtors to creditors.

Courts of equity, in proper cases, where substantial property traceable to the skill and labor of the husband is found to exist, will make a just apportionment between the wife and her husband's creditors: *Penn v. Whitehead*, 17 Gratt. 503, 513; 94 Am. Dec. 478; *Glidden v. Taylor*, 16 Ohio St. 509; 91 Am. Dec. 98.

The fact that the husband acted sometimes as the wife's agent in the conduct of their small business, along with her brother and son, cannot alter the case; for the cases of *Miller v. Peck*, 18 W. Va. 99, and *Atwood v. Dolan*, 34 W. Va. 563, sustain the position that a married woman with separate estate may barter and trade with reference thereto by her husband as agent, and will be entitled to the increase thereof. The mere marital relation does not disqualify the husband from acting as his wife's agent with reference to her separate

estate: *Prentiss v. Paisley*, 25 Fla. 927; *Keller v. Mayer*, 55 Ga. 406. The mere fact that he is agent will not render her property or its profits liable to creditors: *Wait on Fraudulent Conveyances*, sec. 303; *Voorhees v. Bonesteel*, 16 Wall. 16; *Alldridge v. Muirhead*, 101 U. S. 397.

²⁵³ In this case the unfortunate husband, smitten with accumulated misfortune, disease, physical and mental, sending him to a hospital, contributed very little in the family struggle for existence; in fact, he must have been a charge rather than a help. We cannot say that any accumulation came from his labor, but from the young son and the kindly helping hand and counsel of the wife's brother, Daniel Heffebower. Where husband and wife unite in fraudulent purpose to divert the husband's considerable earnings and hide them from creditors, under the shelter of her separate estate, the case is different. No fraudulent purpose of the wife appears in this case. She, with the help of her brother, was struggling almost for life itself. The husband had nothing to hide from creditors, either in estate or ability to labor. He does not appear to have been guilty of intentional fraud. He surrendered everything to creditors, and was left penniless and broken in body and mind. He traveled some, selling machinery, and gave his earnings to one of the creditors in this case.

On the facts proven, we could not find fraudulent intent. Under the facts, not evidence, as certified, the source from which the property came, and how paid for, appear, and none came from the husband. Clearly it came from the wife's estate. Any idea that it came from the husband is repelled. It is further contended that because the son, Edgar A. Conklyn, labored earnestly in the family distress, and as under the law his services belonged to the father, this makes the products of land and property liable for his debts.

The father has a right to the son's services and earnings in consideration of his support and care in tender years of helplessness; but he may emancipate the son, and thus the son becomes entitled to his own services and earnings, and may dispose of them as he pleases. Creditors cannot compel their debtor to work himself or to compel his children to work for them, nor sell under process their future service, though property created by their past labor may be subjected. Even a parent involved in hopeless insolvency can thus emancipate his child and remove his services and ²⁵⁴ earnings from the grasp of creditors. Such emancipation may be oral or writ-

ten, may be proven by circumstantial evidence, or may be implied: *Halliday v. Miller*, 29 W. Va. 424; 6 Am. St. Rep. 653, and note; *Penn v. Whitehead*, 17 Gratt. 503; 94 Am. Dec. 478; *Wilson v. McMillan*, 62 Ga. 16; 35 Am. Rep. 115, and note discussing the subject generally.

In *Wilson v. McMillan*, just cited, the right of an insolvent father to emancipate his child, who remained at home, and was hired by the father, was upheld. Were these doctrines not to prevail the child would for years be engulfed in his father's ruin and bankruptcy, unable to get support, unable to obtain an education for the struggle of life, his whole future blasted.

In this case the son did remain at home; but reason holds that if the law allow such emancipation at all, it would not require as a condition of its exercise that the ties of home be broken and the child driven from the parental roof. In this case, if we cannot say the father emancipated the child, we may say certainly that he consented that he might give his labor to his mother.

In the case of *Wilson v. McMillan*, 62 Ga. 16, 35 Am. Rep. 115, the court says that the debtor may give his own labor away; he may consent that his child may give his labor away. A court should look with special liberality upon the consent of a father to his son laboring for his own mother, striving for a living, when that labor gave to himself and his mother the bread of life, when the father, broken by insolvency and disease, in estate, body, and mind, was unable to give them maintenance.

In *Atwood v. Dolan*, 34 W. Va. 563, the fact that seven sons labored on the farm in producing crops was not considered enough to destroy the wife's right.

Rush v. Vought, 55 Pa. St. 437, 93 Am. Dec. 769, holds that where sons, with their father's consent, labor on wife's land, this will not render crops liable to his creditors.

These principles lead to the conclusion that the products of the eighty-one acres are not liable to the husband's debts, nor are articles purchased with them.

²⁵⁵ But how as to the products of the other tract? This question presents more difficulty. If we were bound to say that the lease of this tract was vested in James H. Conklyn, and he sublet to his wife, we might have to say that this subletting would be void, and the lease still the husband's, and that the right to its crops would follow the right to the land,

and be the husband's, notwithstanding the wife contributed in their production with her stock, implements, and hired labor: *Hamilton v. Booth*, 55 Miss. 60; 30 Am. Rep. 500; *Rush v. Vought*, 55 Pa. St. 437; 93 Am. Dec. 769. It would be a mingling of her separate estate with his beyond distinction, and thus fall under the principle that, where she allowed her separate estate to be indistinguishably mixed with the husband's property hers is lost to her as separate estate, as regards his creditors: Wells on Married Women, 119; 2 Bishop on Married Women, secs. 88, 818, 820; *Glover v. Alcott*, 11 Mich. 470; *Glidden v. Taylor*, 16 Ohio St. 509; 91 Am. Dec. 98. And thus, not only the crops, but perhaps all the property, save only the crops in kind of the eighty-one acres, would be liable, because, the products of the other tracts helped in buying such property.

But we do not regard the lease of this farm (Mrs. Nancy Conklyn's farm) as the leasehold property of James H. Conklyn. It was farmed until April, 1885, by another son of hers, and about Christmas, 1884, there was an indefinite arrangement between James H. Conklyn that he was to farm it, for what term we do not know; but before doing any thing he told his mother that, owing to his insolvency, he could not do so, and wished to give it up, and she replied "she did not wish to make any more changes, and he should keep the land, and make the best arrangements he could with it, and accordingly he turned it over to his wife," by whom it was held and farmed just as the other farm, she paying landlord's share of crops. We think he acted as his mother's agent in leasing to the wife, making it the wife's lease. He had no substantial estate in it, one worth any thing to creditors; for as regarded his leasehold, the work of making crops and the burden of paying rent were yet unperformed. On the facts certified as facts, we hold that the law does not hold that property liable to said executions.

256 Instructions: I shall not pass upon the one called "court's instruction," as I do not think the record shows that it was objected to or excepted to.

Defendants' instructions 1 and 2 are based upon principles of law above stated, and need not be discussed. It is only necessary to say, for the purpose of future proceedings in the case, that as given they seem to put the law correctly.

Defendants' instruction 3, that if James H. and Susan Conklyn were married prior to April 1, 1869, without mar-

riage contract, and she acquired by the will of her father, prior to that date, three hundred dollars, and she or her husband with it purchased any of the property levied upon, or any property of which that levied upon is the increase or product, then such property was the husband's, is erroneous. On April 1, 1869, section 3, chapter 66, as part of our code, took effect. It is not retroactive, but declares that any married woman "may take" and hold property as separate property. If the husband, on April 1, 1869, had such a vested right in his wife's legacy as was property, the statute would not affect it: 1. Because we would not construe it to retroact upon vested property rights; and, 2. It would be unconstitutional so applied. But the husband's right under the law prior to that date gave him his wife's choses in action only conditionally; that is, upon reduction to possession. Till that act the property therein was not vested in him, but in her; as, if he died, she surviving, she retained it, which could not be if it had perfectly vested in him. Therefore, the husband not having reduced the chose to possession when the code took effect, we can say the wife took the chose; the new law operated upon it before the act of reduction to possession took place. Moreover, I do not see how creditors could, in the manner proposed in this proceeding, avail themselves of his right, he having done no act to reduce the chose to possession, nor have the creditors resorted to any process available to do so; but I have not fully considered this, it not being necessary to do so. The New York courts hold the doctrine that it is a vested right in the husband, which cannot be divested by legislation: *Westervelt v. Gregg*, 12 N. Y. 202; 62 Am. Dec. 160, and note 167.

²⁵⁷ But the weight of decision is adverse to this view: *Alexander v. Alexander*, 85 Va. 353, and cases cited; 1 Bishop on Marriage and Divorce, sec. 675; 2 Bishop on Married Women, sec. 45; *Price v. Sessions*, 3 How. (U. S.) 635 (opinion); Wells on Married Women, 93, holds the New York opinion; so Wade on Retroactive Laws, sec. 184.

Another error in the court below was the admission in evidence of a letter from James H. Conklyn to his brother Charles. Charles was surety for James H. in these debts. James H., as a witness, stated that he had conversations with Charles in which he asked him to still run the notes, and, if he would do so, his wife would pay them out of crops raised by her, and that he acted as agent for his wife, and never

otherwise. The defendants then introduced the letter in which James H. Conklyn promised unequivocally to pay the debts out of the wheat crop, not hinting any thing as to agency.

It is very evident that the defendants desired to get the full benefit of the absolute statement of James H. Conklyn as a declaration by him that he owned the wheat crop and would pay the debt out of it, and did not want to use it simply to impeach the veracity of a witness, else the letter would have been offered for that purpose only. It was admitted in evidence generally, and it can be readily seen how much calculated it was to influence the jury to the prejudice of the plaintiffs in the issue. Used for and limited to impeachment purposes it was admissible; but not otherwise, for it is simply unsworn statement, hearsay, not at all binding on the wife. *Glover v. Allcott*, 11 Mich. 470, in just such a contest as this, holds that the declaration of the husband is not admissible against the wife: 2 Wharton on Evidence, sec. 1215; 1 Greenleaf on Evidence, sec. 100. It is inadmissible under the general law of evidence, without regard to the relation of husband and wife, or the nature of the suit.

The judgment is reversed, verdict set aside, and new trial awarded.

Reversed. Remanded.

In the case of *Brooks v. Applegate*, 37 W. Va. 373, it appeared that the firm of Brooks, Rogers & Co. filed a bill against Applegate and Walters, and others, to subject a tract of land to a debt due the plaintiffs by the defendant firm, of which firm Walters had been a member. The bill alleged that the land had been purchased by said Walters and one Lucas in 1876 by executory agreement, and in February, 1886, when Walters was insolvent, conveyed by collusion between Walters and Lucas to Walter's wife to defraud creditors, and alleging that the land was paid for by the husband.

The defendants had judgment dismissing the bill in the lower court, and on appeal by plaintiffs the supreme court held that the case was controlled by the principles laid down in *Seitz v. Mitchell*, 94 U. S. 580, to the effect that a purchase of property during coverture by the wife of an insolvent husband is justly regarded with suspicion, and raises a presumption that it was not paid for by or out of her separate estate. She cannot prevail in contests with his creditors, involving their right to subject the property so acquired to the payment of his debts, unless such presumption is overcome by clear affirmative proof on her part.

"This court, in *McMasters v. Edgar*, 22 W. Va. 673, has adopted this principle to the fullest extent, holding that 'where property is alleged to have been purchased by a wife, or a conveyance of property is made to her, during coverture, the burden is upon her to prove distinctly that she paid for it with means not derived from her husband. Evidence that she made

the purchase, or that the property was conveyed to her, amounts to nothing, unless it be accompanied by clear and full proof that she paid for it with her own separate estate; and in the absence of such proof the presumption is that her husband furnished the means to pay for it, and it will be subject to his debts.'

"In numerous cases has this court iterated and reiterated this to be the law: *Rose v. Brown*, 11 W. Va. 122; *Stockdale v. Harris*, 23 W. Va. 499; *Burt v. Timmons*, 29 W. Va. 441; 6 Am. St. Rep. 664. This is the rule, though the conveyance be not from husband to wife. If we view this land as originally purchased by the husband, the case is still stronger that the wife must prove that she paid her separate means, and the case is free from fraud: *Core v. Cunningham*, 27 W. Va. 206; *Burt v. Timmons*, 29 W. Va. 441; 6 Am. St. Rep. 664. Having so often held these principles, we must firmly adhere to them. They are necessary to business safety. The marriage is so often, and can be so readily, used to defraud creditors, the proof is so difficult to obtain to prove that the husband's means paid for the land, that the presumption above defined exists in behalf of creditors.

"Starting with these principles, reading the evidence of the husband, his wife, and Lucas, the only witnesses examined, we are compelled to say that we are not at all convinced that Mrs. Walters paid for the land. I shall not detail evidence. The land is liable to the plaintiffs' debts; and the cause is remanded, with direction to enter a decree for plaintiffs' debt and subjecting the land thereto."

In *Tufts v. Copen*, 37 W. Va. 623, it appeared that a married woman, who was the owner of a tract of land lying on a creek, as her separate estate, for a valuable consideration, gave her verbal assent that a third party might build a tram road along said creek through her land for the purpose of transferring timber from land lying above hers to market, and in pursuance of such verbal assent such third party, at considerable expense and under her immediate observation, constructed such tram road, and operated it for some time. Shortly before this action was brought the owner of such separate estate and her husband obstructed such tram road, and denied the licensee the use thereof, by building a fence across it, and by threats and violence had prevented him from having the full use and enjoyment of his easement. He then brought suit in equity against the wife and husband to enjoin them from in any manner interfering with his right to the free and uninterrupted use and possession of such road. The trial court dismissed the bill, and on appeal this ruling was reversed, and the injunction prayed for was made perpetual. The appellate court considered the right involved as constituting a parol license amounting to an easement, which was enforceable against the licensor; and in support of this position quoted from *Wynn v. Garland*, 19 Ark 23, 68 Am. Dec. 190, to the effect that "where parol license amounting to an easement has been given, and where the enjoyment of it has been necessarily preceded by expenditure of money or capital, or where the grantee has made improvements in good faith under the grant, or invested his capital in consequence of it, the grantee becomes a purchaser of the easement granted by parol, for a valuable consideration, and will be entitled to have it specifically performed in equity, unless the party will reimburse him in his expenditures, or pay him for his improvements, provided this will put the grantor *in statu quo*." And to the same effect cited *Morton Brewing Co. v. Morton*, 47 N. J. Eq. 158, and *Rindge v. Baker*, 57 N. Y. 221; 15 Am. Rep. 475.

It was contended in the present case that a married woman had no right

to grant such parol license or easement as that which formed the subject of dispute, but the court decided that as she was entitled to receive the rents, issues, and profits of her separate estate, and to enjoy it free from the control or disposal of her husband, as if she were single, she necessarily had control of, and might herself make, such contracts as would enable her to receive, such rents and profits. In disposing of this question the court observed that "a married woman is *sui juris* to the extent of the enlarged capacity to act conferred by statute, and may be estopped by her acts and declarations, and is subject to all the presumptions which the law indulges against others with full capacity to act for themselves. To this extent the old restrictions of the doctrine of estoppel, as applied to married women, are not in force, because, the reason of the rule ceasing with the removal of the incapacity, the rule fails." The above quotation is from the case of *Boline v. Killeen*, 53 N. Y. 93; and it is held in the *syllabus* of that case that married women, to the extent and in the matters of business in which they are by law permitted to engage, owe the same duties to those with whom they deal and may be bound in the same manner, as if unmarried." And "a married woman may engage in trade, in the commercial sense, and in other employments which require time, labor, and skill, and shall be bound by her contracts made in such business. When the statute retains to the wife her property, real and personal, and secures to her the rents, issues, and profits, it intends she shall, like any other proprietor, so deal with it as to make profit. She may rent her lands, or make any contract for the use thereof. She may engage for buildings thereon, materials therefor, or for work or labor, or improvement of the same. . . .

"The tendency of legislation, guided by the lessons of experience and enlightened reason, is to a larger freedom from the common-law disabilities of coverture. . . .

"When the legal capacity exists, the contract stands upon the same footing as if she were unmarried. If she bargains with a mechanic to build a dwelling-house, she will not be heard to object to the debt because of her imprudence or folly in causing the erection of too expensive a house. . . .

"The capacity conceded, a married woman, like other persons, must take the chances and risks of her business transactions. The law will not intervene, and relieve from all consequences of their mistakes, misfortunes, or follies": *Netterville v. Barber*, 52 Miss. 171. The following cases were also cited to maintain the proposition that if a married woman is in the possession and control of property, claiming it as her own, and on her declaration of ownership creates a charge thereon, by express agreement, for a good consideration, though for a purpose not beneficial to her estate, or even for the sole benefit of her husband, she is bound in equity by the obligation she thus deliberately chooses to assume. She is estopped from setting up her coverture in avoidance of a performance of the contract, if executory, or in avoidance of the contract, if executed; and in no case is she allowed to rescind or repudiate the contract until she has put the other party in *statu quo*: *Owen v. Cawley*, 36 N. Y. 600; *Saratoga Co. Bank v. Pruyn*, 90 N. Y. 250; *Nixon v. Halley*, 78 Ill. 612; *Patterson v. Lawrence*, 90 Ill. 174; 32 Am. Rep. 22; 2 Pomeroy's Equity Jurisprudence, sec. 814; Wells on Separate Property of Married Women, sec. 325.

HUSBAND AND WIFE—SEPARATE ESTATE OF WIFE, WHAT BELONGS TO. Property paid for partly out of the wife's separate estate and partly out of moneys borrowed on the faith of her existing property is her separate estate:

Flournoy v. Flournoy, 86 Cal. 286; 21 Am. St. Rep. 39. Compare *Schuster v. Bauman Jewelry Co.*, 79 Tex. 179; 23 Am. St. Rep. 327.

HUSBAND AND WIFE—LIABILITY OF WIFE'S SEPARATE ESTATE FOR HUSBAND'S DEBTS.—The fact that a husband assists his wife in the management of her separate estate does not impair her title to the products of such estates: *Second Nat. Bank v. Merrill*, 81 Wis. 151; 29 Am. St. Rep. 877; *Lachman v. Martin*, 139 Ill. 450; *Brown v. Carey*, 149 Pa. St. 134; *Hearts v. Klinkhammer*, 39 Minn. 488. Nor can the value of the husband's labor and skill, in such a case, be reached by creditors: *Nance v. Nance*, 84 Ala. 375; 5 Am. St. Rep. 378.

HUSBAND AND WIFE.—MARRIED WOMEN'S ACT NOT RETROSPECTIVE AS REGARDS MARITAL RIGHTS: See *Westervelt v. Gregg*, 12 N. Y. 202; 62 Am. Dec. 160; *Junction R. R. Co v. Harris*, 9 Ind. 184; 68 Am. Dec. 618; *Gilmore v. Bright*, 101 N. C. 382. But the proceeds of the sale of land, to which the wife acquired title before the passage of such an act, belong to her, if the sale took place after such passage: *Kirkpatrick v. Holmes*, 108 N. C. 206. So, also, personal property accruing to a married woman as her distributive share of a decedent's estate, but not reduced to possession by her husband before such an act was passed, belongs to her absolutely: *Keagy v. Trout*, 85 Va. 390.

PARENT AND CHILD.—AN INSOLVENT FATHER MAY RELINQUISH HIS RIGHT TO HIS SON'S EARNINGS: *Atwood v. Holcomb*, 39 Conn. 270; 12 Am. Rep. 386; *Bobo v. Bryson*, 21 Ark. 387; 76 Am. Dec. 406; *Penn v. Whitehead*, 17 Gratt. 503; 94 Am. Dec. 478; *Halliday v. Miller*, 29 W. Va. 424; 6 Am. St. Rep. 653, and note to *Wilson v. McMillan*, 35 Am. Rep. 117-121.

BENNETT v. BENNETT.

[87 WEST VIRGINIA, 896.]

A JUDGMENT CONFESSED BY A HUSBAND IN FAVOR OF HIS WIFE for a debt justly due from him to her, on account of her separate estate, is valid against all persons unless impeached for fraud.

HUSBAND AND WIFE—LOAN OUT OF SEPARATE ESTATE—PRESUMPTION.—A loan by a wife to her husband out of her separate estate to be valid as a loan must be accompanied with an express promise of repayment made at the time. Otherwise it is presumed to be a gift.

HUSBAND AND WIFE—GIFT, PRESUMPTION OF.—Money of the wife received from her by her husband, though belonging to her separate estate, is presumed to be a gift. Before she can recover it from him or his estate as against his creditors, she must establish by clear proof that it was a loan with an express promise of repayment made at the time of the transaction.

HUSBAND AND WIFE.—If a husband uses and deals with separate property of his wife as his own, a gift is presumed, and their testimony of a private understanding between themselves that the transaction was intended as a loan, is not sufficient as against the creditors of the insolvent husband, to rebut the presumption.

EVIDENCE OF CONTENTS OF PRIVATE BOOK ENTRY BY A DECEASED PERSON of payments of money is inadmissible to prove such payments when neither the book nor a copy of the entry is produced, nor the book verified.

PAYMENTS, PROOF OF AS AGAINST THIRD PERSONS.—A written instrument signed by the heirs of a deceased debtor showing that they had received various sums from him, is not admissible to prove such payment as against his creditors or strangers.

HUSBAND AND WIFE—TRANSACTIONS BETWEEN—EVIDENCE TO IMPEACH.—In transactions between husband and wife less proof is required to impeach the act, and more and stricter proof to repeal impeachment than between strangers.

J. H. Woods, for the appellant.

Dayton and Dayton, for the appellee.

397 BRANNON, J. On April 19, 1889, R. C. Bennett confessed a judgment in favor of Maggie Bennett, then his wife, and she brought a chancery suit in Barbour county against R. C. Bennett and others, alleging the said judgment, and that it was based on borrowed money belonging to her separate estate, for which R. C. Bennett had executed to her his obligations, and that said judgment was a lien on R. C. Bennett's land; and praying that it be enforced against the same.

J. A. Bishop and William T. Bishop, who were made defendants as judgment creditors, answered the bill, demurring to it, and claiming that, as the judgment had been confessed while the parties to it were husband and wife, it was void, and not a lien on the land of R. C. Bennett; alleging that if Mrs. Bennett had received money from her father's estate, and her husband had used it, he gave her no obligations at the time for it, and they used their funds in common; that he purchased the land with his own means, or, if with her means, she had given it, without any written evidence of debt for it, and had no such evidence until any claim by her was barred by limitation; and that said judgment was confessed to hinder, delay, and defraud them and other creditors of R. C. Bennett.

Said J. A. Bishop, a judgment creditor of R. C. Bennett, brought an independent suit of his own to enforce his judgment, and in his bill assailed said confessed judgment as void in law and intended to defraud creditors.

398 The two causes were heard together, resulting in a decree adjudging the said judgment void, but according to Mrs. Bennett a lien from the institution of her suit, decreeing several liens against R. C. Bennett's land, giving priority to the debt of Mrs. Bennett, and subjecting the land to sale. From this decree J. A. Bishop and William T. Bishop appeal to this court.

The first question I shall discuss is whether a judgment confessed by a husband in favor of his wife is valid. It is contended that as a wife cannot sue a husband at law, cannot contract with him, or sue him at law upon his obligation, the judgment must be to all intents void. Our statute (chapter 66 of the code) allows a married woman to hold and enjoy property as her separate estate free from the power of her husband, and from that fact it might be thought she could sue him to effectuate and vindicate her separate property right—sue him as well as any one else; and especially so as section fifteen gives her the right to sue alone “where the action or suit” concerns her separate property, or is between her and her husband, using the words “action or suit,” referring both to actions at law and suits in equity, seeming to be an unlimited grant of capacity to sue her husband.

In several states, where similar statutes prevail, she is allowed to contract with her husband and sue him: *Scott v. Scott*, 13 Ind. 225; *Wilkins v. Miller*, 9 Ind. 100; *May v. May*, 9 Neb. 16; 31 Am. Rep. 399; *Wright v. Wright*, 54 N. Y. 437; *Wilson v. Wilson*, 36 Cal. 447; 95 Am. Dec. 194; *Hall v. Hall*, 52 Tex. 294; 36 Am. Rep. 725.

The tendency of decisions seems to be that way. How can she obtain a lien for her just debt on her husband's land? Others can obtain judgment liens before justices which may absorb his estate, leaving her without relief. From cases which I noticed in examining other matters I incline to think that under our statutes she could maintain ejectment or detinue against her husband to recover real or personal property: *Crater v. Crater*, 118 Ind. 521; 10 Am. St. Rep. 161; *Wood v. Wood*, 83 N. Y. 575; *Minier v. Minier*, 4 Lans. 421; *Emerson v. Clayton*, 32 Ill. 493; *Martin v. Robson*, 65 Ill. 129; 16 Am. Rep. 578; *McKendry v. McKendry*, 131 Pa. St. 24; 6 Lawyer's Rep. Ann. 506, and note.

²⁹⁹ In *Alexander v. Alexander*, 85 Va. 353, the opinion supports the right to sue the husband at law because of the Married Woman's Act. But the common law prevails with us, and under it a wife cannot contract with her husband; and chapter 66 of the code, giving her right to hold separate property has not given her capacity to contract at law, or to contract with her husband: *Pickens v. Kniseley*, 36 W. Va. 794. She cannot sue her husband at law, because she cannot contract with him at law: *Roseberry v. Roseberry*, 27 W. Va. 759.

But here is a confessed judgment. Is it good? The question is not between the husband and wife; it is not whether he could plead the invalidity of the judgment, but whether strangers to the judgment, creditors of the debtor, can allege its invalidity. In Arkansas, where the statute is the same as ours, judgment confessed by the husband in his wife's favor was held void because of the unity of the husband and wife; but there the husband attacked the judgment. But in *Simmons v. Thomas*, 43 Miss. 31, 5 Am. Rep. 470, while it was held that, where a husband owes a wife, the proper forum for the enforcement of the indebtedness is chancery, yet if he confessed a judgment, it was valid and could be assailed only for crime, malice, or fraud against creditors. It was a contest between judgment creditors, and the wife was given the preference under her judgment.

In *Williams' Appeal*, 47 Pa. St. 307, it was held that a judgment admitted to be unobjectionable in point of honesty, given by a husband to secure his wife her separate estate, in a question of distribution, will not be void in law or equity because of the legal unity of the parties. The relation not appearing in the record, the court will not, at the instance of the creditors, inquire into the fact of coverture when no fraud is alleged.

In *Rose v. Latshaw*, 90 Pa. St. 238, and *Lahr's Appeal*, 90 Pa. St. 507, it was likewise held. I am aware that law and equity are in Pennsylvania administered in the same action, but the principle is stated generally.

1 Black on Judgments, section 56, says: "The indebtedness of the husband to his wife, by note or for money or property, is a ⁴⁰⁰ sufficient consideration to support a judgment confessed by him in the wife's favor as against his other creditors, when not impeached for fraud; and such a judgment admitted to be honest, will not be treated as void in law or equity, because of the legal unity of the parties, and, the relation not appearing in the record, the court will not, at the instance of creditors, inquire into the fact of coverture, when no fraud is alleged." He cites *Thomas v. Mueller*, 106 Ill. 36, and *Williams' Appeal*, 47 Pa. St. 307, which I find to support his text, though in Illinois a statute authorizes such suit.

Therefore I think a confessed judgment by husband in favor of wife cannot be attacked by strangers simply because it is between husband and wife, based on a contract between them. The only question which creditors can ask is: Was

there an honest debt due from husband to wife for her separate estate? If so, she has the same right as they. He can prefer her as well as any other creditor. If it is a just debt, a court of equity, which fully recognizes that a husband may be debtor to his wife, will not split hairs as to the form of the indebtedness. Will such court allow strangers to say, that she shall not have the priority of the judgment on account of the form of the preference because of the technical principle of common law which does not permit a wife to sue a husband, when they would recognize a deed of trust or mortgage? I think not.

The husband may plead the coverture, but why should strangers be allowed to do so? *Roseberry v. Roseberry*, 27 W. Va. 759, only holds that she cannot sue him at law, and he can plead the coverture, but does not decide that his confessed judgment would be void. He is *sui juris*, and competent to waive his exemption from suit by her. If he were to execute a deed of trust to her for a just debt such deed would be good. Though courts of law regard contracts between husband and wife creating a debt utterly void, yet courts of equity give force and effect to them, and will enforce a loan by wife to husband out of her separate estate: 2 Story's Equity Jurisprudence, sec. 1372; *Medsker v. Bonebrake*, 108 U. S. 66; *Atlantic Nat. Bank v. Tavenner*, 130 Mass. 407, and cases cited; *Hanson v. Manley*, 72 Iowa, 48; cases ⁴⁰¹ cited in opinion in *Kanawha Valley Bank v. Atkinson*, 32 W. Va. 210; 25 Am. St. Rep. 806; *Simmons v. Thomas*, 43 Miss. 31; 5 Am. Rep. 470; 1 Bishop on Married Women, sec. 360; Schouler on Husband and Wife, sec. 395; *Jaycox v. Caldwell*, 51 N. Y. 395; *Whitford v. Daggett*, 84 Ill. 144.

Equity has jurisdiction of suits by a wife to enforce her debt against her husband. Would not a confessed decree be a lien on his land? Why should not a judgment? He has waived exception to the jurisdiction. But creditors may assail such judgment just as they may assail a transfer of property from husband to wife. They can show that it is not founded on her separate estate, or that, if the husband in fact received her separate estate, it created no debt, or that the whole transaction was intended to defraud them. They to assault this judgment.

While a *bona fide* loan by a wife to her husband out of her separate estate will be valid in equity, yet it must be a loan, an indebtedness by express promise of repayment made at

the time of the loan; for when he receives her money no implied promise of repayment, legal or equitable, arises, as would be the case were they not husband and wife, but the law in such case presumes she intended a gift: *McGinnis v. Curry*, 13 W. Va. 29; *Kanawha Valley Bank v. Atkinson*, 32 W. Va. 203; 25 Am. St. Rep. 806; *Zinn v. Law*, 32 W. Va. 447; *Maxwell v. Hanshaw*, 24 W. Va. 405; *Beecher v. Wilson*, 84 Va. 813; 10 Am. St. Rep. 883; *Grover etc. Sewing Machine Co. v. Radcliff*, 63 Md. 496; *Jacobs v. Hesler*, 113 Mass. 157; *McLure v. Lancaster*, 24 S. C. 273; 58 Am. Rep. 259.

Where there is no promise of repayment she cannot recover, even from his estate: *Reed v. Reed*, 135 Ill. 482.

"Where her land is turned into money and she does not place her part of the money with some indifferent person for her as her separate estate, but suffers the whole to be paid to the husband, the clearest proof is requisite to rebut the presumption that it was paid to and accepted by the husband for himself": *Temple v. Williams*, 4 Ired. Eq. 39.

A mere general understanding that the money so received by him belonged to his wife, and that he considered himself accountable to her for the same, is not sufficient to establish the relation of debtor and creditor between husband and wife. To establish a debt in favor of the wife against creditors of the husband it must appear that it was received by the husband under an agreement to repay it to her, or to invest it for her use. If, without such agreement to pay or invest, he invests it in business, and afterwards executes a voluntary bill of sale to secure her, it will be fraudulent in law against existing creditors: *Kuhn v. Stansfield*, 28 Md. 210; 92 Am. Dec. 681. Without such promise of repayment she cannot afterwards set up a claim upon the footing of a creditor, as she is taken to have acquiesced in such appropriation of the money for the common benefit of herself and husband, or the benefit of the family: *Grover etc. Sewing Machine Co. v. Radcliff*, 63 Md. 496; *Hanson v. Manley*, 72 Iowa, 48; *Kanawha Valley Bank v. Atkinson*, 32 W. Va. 210; 25 Am. St. Rep. 806.

There is a presumption of law that a post-nuptial settlement in favor of a wife is void as to existing creditors: *Robbins v. Armstrong*, 84 Va. 810; *Beecher v. Wilson*, 84 Va. 813; 10 Am. St. Rep. 883; *De Farges v. Ryland*, 87 Va. 404; 24 Am. St. Rep. 659.

"If money which a married woman might have secured to her own use is allowed to go into business of the husband, be

mixed with his property, and applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in business, and is thus used for a series of years, such real estate, unless there is at the time of its purchase a specific agreement that it shall belong to the wife, becomes the property of the husband for the purpose of paying his debts. A conveyance thereof to his wife upon the occurrence of his bankruptcy is a fraud upon his creditors, and void": *Humes v. Scruggs*, 94 U. S. 22.

In New Jersey it was held that where the wife knows that her money is invested in land in the husband's name, even with the design to create a trust for her, and on his apparent ownership he obtains business credit, equity will not protect it from the husband's creditors; and this for the reason, as the court said, that she knew the lands were in his name, and that he was engaged in business involving hazard, and was credited because of such ownership, and would incur debts in business; and this state of things existing until the hour of disaster came, it would be against ⁴⁰³ plain justice to permit her then to step in and withdraw from creditors the very property she had permitted him year after year to represent to be his, and the apparent ownership of which had given him credit and standing: *Besson v. Eveland*, 26 N. J. Eq. 468.

When a husband, with wife's knowledge, collects wife's money, and, without her objection, uses it for ten years, obtaining credit on faith of it, the wife cannot afterwards assert her claim against creditors: *Driggs etc. Bank v. Norwood*, 50 Ark. 42; 7 Am. St. Rep. 78. In *Lahr's Appeal*, 90 Pa. St. 507, the Pennsylvania court, while recognizing a confessed judgment in favor of the wife, said that "for prevention of fraud clear and satisfactory proof of a wife's claim against her husband is exacted in a degree not required of others."

Having these principles of law before us, let us refer to the facts, to see whether the judgment will stand or fall before the onslaught of creditors. The claim is that Mrs. Bennett received from her father four thousand four hundred and twenty-six dollars in his lifetime, and from his administrator one thousand two hundred and fifty three dollars and eighty-five cents. Her pleadings say that she lent her husband all this large amount of money, so as to justify a confession of judgment by him of six thousand two hundred and eighty dollars and seventy-two cents. Her answer says that he

bought the shares of certain Dolton heirs in land with this money, and the impression which one would derive from the answer is that it was all applied in that way; but only two thousand four hundred and ninety-three dollars of it went there. There is no appearance of where the balance went. She claims that he was to buy the land in her name, but that he took deeds in his own name, and she lent him money to pay the purchase money deferred. If that was the only application of her money, she lent him no sum equal to the confession of judgment for six thousand two hundred and eighty dollars and seventy-two cents. Where went the balance? But if she did let him have all this money, it must have gone into his own business ventures or pleasures.

The theory that she intended the money to go into the land as a gift to her husband, not as an investment for her, ⁴⁰⁴ is furthered by the fact that he put nine hundred dollars of his own means into the land, and by the fact that he took deeds to himself, and she, knowing this furnished him money to pay for the land, and allowed the land to stand in his name for years. If the land were bought for her, the natural inference would be that the deeds would have been taken in her name. Were she asserting a claim to the land in kind, she would be met by the legal principle above stated, that she allowed the title thus to be taken and remain for years, the husband appearing as owner to the world, getting credit on the faith of his ownership, and her claim not asserted until he becomes involved. She does not claim the land, however, but seeks to set up a loan.

The law presumes that it was a gift—that she let him have it, not as a debt, but for their common benefit; and she must overthrow this presumption by proving that a loan was intended and made, a promise of repayment, not a mere general understanding that, as it was her money, she was to be repaid, but a contract to repay.

Now, he acquired some interests in the land in February, 1880, the payments falling due in April, 1880 and 1881; one interest paid for in December, 1882, another in March, 1884, others in February, 1884. That no loan was intended at the time when the land was acquired is likely, because Mrs. Bennett's answer says the land had been bought for her, and while the husband insisted on taking the deeds in his name, she lent him money to pay for the land on the trust that he was to convey to her the land. Was it a loan and trust for

the land in kind at the same time? Hardly. If it was a purchase of land to be conveyed by him to her, that would repel the idea of a loan.

The answer alleges that Mrs. Bennett received from her father money as above stated. She must show it to be her separate estate. The evidence does not do so. The administrator says that her father's book charges her with four thousand four hundred and twenty-six dollars advancement. The book is not produced or verified, nor a copy from it. It is merely the witness' own opinion or inference of its contents, and may be a correct or incorrect construction of its contents: 1 Greenleaf on Evidence, secs. 117, 118; *Vinal* ⁴⁰⁵ v. *Gilman*, 21 W. Va. 301; 45 Am. Rep. 562. It is merely a private entry, and it would not be good evidence against creditors: *Fox v. Baltimore etc. R. R. Co.*, 34 W. Va. 474.

An agreement between his various heirs showing they had received various sums from their father, made after his death, including Mrs. B., is filed; but it is *res inter alios acta*, not evidence against creditors. Mrs. Bennett's own unsworn statements cannot thus go in evidence in her behalf against strangers to the paper. Only original evidence can be allowed as to this matter. Mrs. B. and others making this statement are living, and their mere statement is not admissible: 1 Greenleaf on Evidence, sec. 147. A recital in a deed would not be evidence to prove a fact to prejudice strangers to it. Starkie on Evidence, 83, 84, 85, says these principles are based on the clearest principles of justice, and are sacred: Wharton on Evidence, secs. 173, 175.

Thus, there is no evidence that she had this separate estate, except what was paid by the administrator, which must have been received after the land was acquired. Did he get that? A general replication denies this matter of her answer. Neither is there evidence that she made a loan to her husband with promise of repayment. True, the answer states that he made obligations to her, and the mere fact of their execution would be taken for true; but what were they given for? They are not exhibited with the bill. Their dates are not given in her bill or in her answer in the other suit. If they were given, probably their dates would not be taken as truly stated. How easy for them to put any date to notes. No witness ever saw these obligations or attests the loan. The marriage relation, in times of pecuniary disaster, affords so strong an incentive to wrong creditors, and so much oppor-

tunity for so doing, and it is so hard for creditors to seek out and prove fraud, that the law demands clear evidence to enable a wife to set up a debt against her husband as to creditors; and business safety requires us to adhere firmly to these principles.

We exclude from consideration the depositions of Maggie Bennett and others taken before Justice Simmons, because, the taking having been opened, it was adjourned from 19th March "until the 15th —, A. D. 1890," no date ⁴⁰⁶ being fixed, and the depositions were taken not even in the next month, but in May, the adverse party not appearing. Timely exceptions were made to the depositions, which were overruled, while we think they should have been sustained and the depositions suppressed: *Hunter v. Fulcher*, 5 Rand. 126; 16 Am. Dec. 738.

But I am free to say that, were these depositions considered, they would not change the result. Much of their evidence is incompetent. The evidence of the wife intrinsically does not strengthen her case; and were the evidence of the husband and wife the only evidence bearing on the alleged loan and notes, it would be inadequate, for this court held in *Zinn v. Law*, 32 W. Va. 448, that "when the facts and circumstances tend to show that a gift was intended, and that the husband used and dealt with the property as his own, the mere parol testimony of the husband and wife of a private understanding between themselves that the transaction was by them considered or intended as a loan will not, as against creditors of an insolvent husband, rebut the presumption of a gift." The wife's evidence was held insufficient in *De Farges v. Ryland*, 87 Va. 404; 24 Am. St. Rep. 659.

This debt being a means by which it is sought to withdraw property from creditors, the rule often announced by this court applies that in transactions between husband and wife it requires less proof to impeach the act, and more and stricter proof to repel impeachment than between strangers, and, unless it be shown to be free from fraud, it will not be sustained: *Herzog v. Weiler*, 24 W. Va. 199; *Maxwell v. Hanshaw*, 24 W. Va. 405; *Burt v. Timmons*, 29 W. Va. 441; 6 Am. St. Rep. 664. The judgment falls under the ban of section 1, chapter 74, of the code, as a judgment obtained with an intent to defraud creditors.

The decree is reversed, and the cause remanded, in order that another decree may be entered which shall disallow the

debt of Mrs. Bennett, so far as creditors of her husband are concerned, but which shall allow it subordinately to their debts.

Reversed. Remanded. —

HUSBAND AND WIFE.—PRESUMPTION, WHERE HUSBAND RECEIVES AND USES WIFE'S MONEY, IS THAT IT IS A GIFT, NOT A LOAN: *Beecher v. Wilson*, 84 Va. 813; 10 Am. St. Rep. 883; *Estate of Hauer*, 140 Pa. St. 420; 23 Am. St. Rep. 245; *Clark v. Paterson*, 158 Mass. 388; 35 Am. St. Rep. 498.

HUSBAND AND WIFE.—A JUDGMENT TAKEN BY A WIFE FROM HER HUSBAND in good faith for an amount which she at the time believes to be due, may be maintained against her husband's creditors, even though it may be in excess of the amount actually due: *Howard Watch Co. v. Bedillion*, 131 Pa. St. 385.

FRAUDULENT CONVEYANCES.—PRESUMPTION OF FRAUD FROM RELATIONSHIP OF PARTIES: See *Driggs & Co's Bank v. Norwood*, 50 Ark. 42; 7 Am. St. Rep. 78, and note; *Van Raalte v. Harrington*, 101 Mo. 602; 20 Am. St. Rep. 626; *Helms v. Green*, 105 N. C. 251; 18 Am. St. Rep. 893. The rule was applied to the relationship of husband and wife in *Holloway v. Holloway*, 103 Mo. 274; and that of father-in-law and son-in-law in *Gregory v. Gray*, 88 Ga. 172; *Hicks v. Sharp*, 89 Ga. 311.

CUNNINGHAM v. BARNES.

[37 WEST VIRGINIA, 746.]

PARENT AND CHILD—CUSTODY OF CHILD.—A parent who has transferred the custody of his infant child by fair agreement which has been acted upon to the manifest interest and welfare of the child, will not be permitted to reclaim its custody unless he can show that such change of custody will materially promote its moral and physical welfare.

PARENT AND CHILD—CONSIDERATIONS IN AWARDING CUSTODY OF CHILD.—The welfare of a child is the polar star by which the court is guided in awarding the custody as between contending parties, but the legal rights of the parent will be respected, because founded in nature and wisdom, unless they have been transferred or abandoned.

PARENT AND CHILD—AGREEMENT AS TO CUSTODY OF CHILD.—A father can by agreement surrender the custody of his infant child to another so as to make the custody of that other legal, and he cannot thereafter repudiate such agreement and regain the custody of his child, unless he can show a clear breach of the agreement, or abuse of the child.

R. F. Fleming, for the appellant.

R. H. Freer, for the appellee.

¶47 ENGLISH, P. This was a writ of *habeas corpus* issued in vacation by the judge of the fourth judicial circuit of this state, upon the petition of A. L. Cunningham, against William Barnes and Ruhama Barnes, for the purpose of obtaining

the custody of his infant daughter, Thursby Cunningham, who, at the time said petition was filed or presented, was seven years of age; the defendants being the grandparents of said infant child.

The facts alleged in said petition are that the mother of said infant child, who was the daughter of the defendants, died on the twenty-fourth day of April, 1884, when said child was about fifteen months old; that a few days after the death of its mother the child passed into the hands of her said grandparents, where she remained up to about the 8th or 10th of October, 1889, when said grandparents surrendered the custody, control, and care of said child to the petitioner, and that she remained at his home, in Ritchie county, until the night of November 4, 1889, when about twenty men came, about twelve o'clock at night, and took and carried away said child, and one or more of the parties informed petitioner that they were taking said child to deliver into the custody of said William and Ruhama Barnes; that petitioner was married to his second wife in the month of October, 1886, by whom he had no children, and that said Thursby Cunningham is the only child of petitioner, and that said child was carried away on the night of the 4th of November, as aforesaid, against her will, and against the will of petitioner; that he is able to maintain and educate the child, and bestow upon it such care and attention as is due to it; that he has twelve hundred dollars in real estate besides other property; that he resides in a good community with a school near at hand, which said child was attending at the time she was carried away; that he has demanded the possession of said child, but has been ⁷⁴⁸ unable to obtain possession of her, and has probable cause to believe that she is detained without lawful authority.

In response to said petition, and by way of return to said writ, the said William and Ruhama Barnes, among other things, stated that their daughter, on her deathbed, when in full possession of all her mental faculties in the presence of the petitioner and with his full consent and concurrence, committed the said child to the custody, care, and charge of respondents, for nurture, maintenance, and education, until said infant should reach her majority; and that immediately after her mother's death, when said child was only fifteen and one-half months old, she was brought by the petitioner, in conformity with said understanding and agreement to the house of respondents, who have since gladly kept and main-

tained and most fondly and tenderly cared for her; and that, when said child was so brought to respondents, she was delivered to them by petitioner, with the agreement that she should be kept by them without the interference or control of petitioner; that said child, from that date to the present, had been entirely maintained, clothed, and cared for by respondents—her father contributing nothing to her support, and taking no control over her, only making her a visit at long intervals—and that respondents nursed her for seven weeks through a severe attack of fever, and paid her doctor's bill, amounting to thirty dollars; that they own real estate of the value of three thousand five hundred dollars, and personalty to the value of one thousand five hundred dollars, and intend that said child at their death shall share equally with their own children (of whom they have eight, of whom none are now at home, they having married and left respondent's home to provide for themselves). And they allege that petitioner is the owner of no real estate or personal property whatever; that he is immoral, ill-tempered, and incapable of bearing with the shortcomings of children, uses profane language in his family, and on account of his temperament, habits, nature, and disposition, he is totally unfit to have charge of said child for the purposes of educating, training, etc. They deny that about the tenth day of October, 1889, they surrendered the control and custody of the infant ⁷⁴⁰ child to petitioner, or that they in any way consented to part with the possession, care, and custody of said child, but say that petitioner came to their home, and requested them to allow him to take said child to his house upon a visit, expressly promising to return her to respondents within a short time, and upon these promises and agreements, and upon them alone, petitioner was allowed to take said child to his home for a short time; but that said petitioner did not return the said child, as agreed, and refused to return her when requested, and that some person unknown to respondents returned said child to them.

Respondents also filed an amended answer, alleging that, previous to the marriage of petitioner to his second wife, there was an agreement between them that said infant child should not be claimed by petitioner, nor taken or received into his family, and that subsequent to said second marriage said second wife left him on account of his failure to provide for her reasonable and necessary wants, and that afterwards she returned to him; and they allege that petitioner failed to pro-

vide for his present wife sufficient food and nourishment, and that she complained to her father about it, and that the health of his present wife is very poor, and she claims to be able to do but little, if any, work.

Numerous affidavits and depositions were taken in the case, and witnesses were examined; and on the fourteenth day of August, 1890, a vacation order was made in said cause by the judge of the fourth judicial circuit, directing that the petitioner, Asa L. Cunningham, do have the custody, possession, and control of said minor child, Thursby Cunningham, and that she be delivered by the respondents to the said petitioner, Asa L. Cunningham; and the sheriff, if necessary, was directed to execute said order. The respondents excepted to the judgment of the court, and obtained this writ of error.

Now, as to the question whether the allegations contained in the pleadings were supported by the evidence, it is thought proper to call attention to the fact that, while A. L. Cunningham, the relator, in his petition, alleges that he is worth some one thousand two hundred dollars of real ⁷⁵⁰ estate, besides other property, and swears that the allegations contained in said petition are true, yet, when he is placed on the stand as a witness, he admitted and stated on cross-examination that he was not worth any thing; that he owned no real estate, and had no personal estate; that he had heretofore sold a piece of land, and had realized about one hundred dollars. Said Cunningham also states in his testimony that said Ruhama Barnes came out to him on the porch when he was preparing to start away, after the burial of his wife, and begged him to leave the child with her for a week or so, until he could get a place to take it, and took said child from petitioner's arms, and carried it into the house.

It is, however, shown by the testimony of Barbara E. Barnes, a daughter-in-law of the respondents, that she was present, shortly after the child's mother died, and heard Ruhama Barnes (defendant) say to plaintiff, if she took the child to keep, as the child's mother had requested her to do, that she would never give it up to him again. Plaintiff said it was pretty hard, but told her to take it, and went across the room and told his sister Julia to get the child's clothes and put them in her mother's basket, which she did. He then helped Mrs. Barnes bring the child to her home. Plaintiff said at the time, while his wife was still lying a corpse, that if Mrs. Barnes took the child and cared for her when she was little,

she should always keep her. Leanna Mitchell, who, petitioner admits was present when his wife died, says that it was the dying request of Mrs. Cunningham that her mother, Mrs. Barnes, should take the child, and that petitioner said that it was hard to give——of them up (meaning both of them).

Emily Ferguson also states that she resided with the defendants at the time the plaintiff came after the child, just before this suit was instituted, and was present and heard the conversation in regard to taking the child to plaintiff's home. He said if defendants would let him take the child with him, he would bring her back in a couple of weeks, and would trouble them no more about her if they would let her stay with him that winter, and let her go to ⁷⁵¹ school. It was with this understanding and agreement that he took the child.

D. P. Ayers states that he happened to be at the house of defendants, when the plaintiff was there for the purpose of getting the child to go home with him, just before the institution of this suit. The plaintiff and his father were both there together, and the plaintiff's father said that they would bring the child back in a couple of weeks. He did not hear the conversation before that. They were just fixing to start, when he came in. The child was fretting and crying, and from her appearance was very much opposed to going with her father. He was again at the house of the defendants, before the child was returned to them, and they told him that they had been informed that plaintiff did not intend to let them have the child back.

Joseph Whipkey also says: "I was present when the plaintiff came to get the child to go home with him, and heard him say that, if defendants would let him take the child home with him, he would bring it back when school was out, in the spring."

Yet A. L. Cunningham testifies that on that occasion said Ruhama Barnes pleaded with him not to take the child, and begged him to leave it as much as two years; that defendant, William Barnes, would give him five dollars per month if he would leave said child for two years; that he rejected the proposition, and took her that day to his own home; that respondents on that occasion finally gave up to petitioner the said child.

Petitioner's father, John R. Cunningham, confirms the statement of petitioner as to Ruhama Barnes, begging petitioner

to allow said child to remain two years, and offering to pay him five dollars per month, and says petitioner rejected all propositions and entreaties, and said he had come for the child, and intended to take her home with him, and respondents gave up the child to him, and he took her on the horse, and took her home; and he denied that it was arranged or agreed that the child was to be taken by petitioner on a visit, or to go to school until the school at petitioner's house was out, and then to be taken back to the respondents, and left with them.

753 Thus these two witnesses contradict all the others, whose testimony on the point has been detailed. The petitioner, however, flatly contradicts the sworn statements made by him in his petition in regard to the value of his property; and the sheriff, Job Musgrave, also shows that he was assessed with no property, and that he failed to make an execution for eighty dollars against him, and the statement of the sheriff is confirmed by B. F. Ayers, the attorney, who had the judgment against said petitioner.

The testimony of Barbara E. Barnes, Leanna Mitchell, and Ruhama Barnes clearly shows that, at the time the mother of said child was dying, she requested her mother, Ruhama Barnes, to take the child, and raise it, and the petitioner acquiesced in the arrangement by taking the child and its clothing, and delivering them to said Ruhama Barnes, at her home; and Barbara E. Barnes swears that petitioner said at that time, while his wife was still lying a corpee, that if Mrs. Barnes took the child, and cared for it, when it was little, she should always keep it; and she also heard the defendant, Ruhama Barnes, tell petitioner, shortly after the child's mother died, that if she took the child to keep, as its mother had requested her to do, she would never give it up to him again, and it was with this fair understanding and agreement the petitioner took the child and its clothing and delivered them to the defendant Ruhama Barnes.

This case is somewhat similar, in its facts, to the case of *Green v. Campbell*, decided in December, 1891, and reported in 35 W. Va. 699, 29 Am. St. Rep. 843, in which this court held (sixth point of syllabus): "When a parent has transferred to another the custody of his infant child, by fair agreement, which has been acted on by such other person, to the manifest interest and welfare of the child, the parent will not be permitted to reclaim the custody of the child, unless he

can show that a change of custody will materially promote his child's welfare, moral or physical."

In that case, as in this, the infant's mother died when he was about sixteen months old, when he was committed by his father to the care and custody of his grandparents, who took the care and custody of the child, and kept and maintained ⁷⁵² him up to the time the writ issued. The grandparents were industrious, of high moral character, the owners of a farm, and considerable other property, and were well prepared to care for said child according to his condition in life. They were devoted to the child, and the child as devoted to them. They had no living children of their own, except one son, who was over twenty-one years. The petitioner in that case had contracted a second marriage, but at this point the similarity in the cases ceases; for the petitioner in that case was industrious, of high character, good family, and capable of providing for and raising his child according to his station in life. He was warmly attached to his child, and the boy to him. He owned the farm on which he resided, about three miles from the home of the said grandparents. In that case, however, as in this, at the time of the death of said Green's first wife, it appeared that said Green relinquished said child to their care and custody, with the express understanding, and upon the expressed condition, that it was not, after awhile, to be taken away from them.

It is not intended to assert or hold in this case that every man who is thriftless, or who has been unfortunate and unsuccessful in gathering around him the good things of this world, is to be deprived of the care, custody, and control of his children, even though his morality is not all that it should be, or his temper such as to make his home oftentimes unhappy. Our statute has expressly provided, in section 7 of chapter 82 of the code of 1891, that "the father of the minor, if living, and, in case of his death, the mother, if fit for the trust, shall be entitled to the custody of the person of the minor, and to the care of his education." This right, however is not absolute, as was held by this court in the case of *State v. Reuff*, 29 W. Va. 751, 6 Am. St. Rep. 676, point 4 of *syllabus*, in the following words: "The right of the father or mother to the custody of their minor child is not an absolute right, to be accorded to them under all circumstances, for it may be denied to either of them if it appears to the court that the parent otherwise entitled to this right is unfit for the trust."

That the rule is not arbitrary and inflexible that the father⁷⁵⁴ or mother shall be entitled to the custody of the child under the above-mentioned statutory provision is shown by section 11 of chapter 64 of the code, in reference to divorces, which confers upon the courts the power to use their discretion in decreeing in reference to the care, custody, and control of the minor children, as the circumstances of the parents and the benefit of the children may require. In all cases of controverted right to custody, the welfare of the infant is of paramount importance.

In the case of *Armstrong v. Stone*, 9 Gratt. 102, the court held (third point of *syllabus*): "The father being dead, the mother is entitled to the custody, as of right, and does not lose this right by a second marriage; but where she is seeking, by a writ of *habeas corpus*, to have the child placed in her custody, the court may exercise its discretion, and determine whether, under all the circumstances, it is best for the infant that he should be assigned to the custody of the mother."

Tyler on Infancy and Coverture, at page 283, quotes from Hurd on *Habeas Corpus* as follows: "The welfare of the infant is the polar star by which the discretion of the court is to be guided, but the legal rights of the parent or guardian are to be respected. They are founded in nature and wisdom, and are essential to the peace, order, virtue, and happiness of society; but they may have been abandoned, transferred, or abused." This author also says: "It frequently happens that the father of an infant, upon the death of its mother or other event, makes an arrangement by which he gives his child to a third person, or relinquishes his custody to it, until it is of age, upon consideration that the party agrees to adopt the child, and care for it as his own, and then, after the affections of both child and adopted parent become engaged, and a state of things has arisen which cannot be altered without risking the happiness of his child, will attempt to reclaim the custody of the child. In such cases few rules are found for the government of the courts, and there are decisions, both in England and this country, to the effect that the father would not be bound by such a transaction, and could recover the custody of the child, even though the interests of the child had been promoted⁷⁵⁵ by the original transfer. But the better opinion is that the father, in such a case, is not in a position to require the interference of the court in favor of a controll-

ing legal right on his part against the rights, such as they are, the feelings and the interest of the other parties"; citing numerous authorities.

The same author, on top page 540, speaking of voluntary transfers of custody, says: "It has been seen that a parent may emancipate his minor child by voluntarily relinquishing his claim to the services of the child, or by permitting the child to contract marriage or other relations inconsistent with filial subjection, and may also forfeit his right of custody by cruelty or gross neglect of duty. Why, then, may he not transfer to another this right of custody which he may thus abandon or forfeit, especially where the interests of the child are not prejudiced by the assignment? And how can the court pronounce that custody, which is held under a fair agreement with the parent, and not injurious to the welfare of the child, to be an illegal restraint?"

In volume 2 of the American State Reports, at page 184, Freeman, in his notes to the case of *Brooke v. Logan*, 112 Ind. 183, 2 Am. St. Rep. 177, under the heading, "Right of Father to Transfer Custody of His Child," after discussing the question at some length, and citing authorities, says: "On the other hand, the weight of authority in this country sustains the position that a father can, by agreement, surrender the custody of his infant child to another so as to make the custody of that other legal," citing several authorities. He continues: "And in all controversies subsequently arising respecting its custody the court will consider the welfare of the child as the matter of primary importance."

Church, in his valuable work on *Habeas Corpus*, in section 444, under the heading, "How Far a Parent May by Agreement Surrender the Custody of His Child," after speaking of the statute law in several states and the common-law doctrines, says: "Yet the later decisions in this country are undoubtedly against the repudiation of an agreement by a parent to surrender to another the right to the custody of his infant children, and unless a clear breach ⁷⁵⁶ of the agreement or abuse of the child is shown, the courts will not assist him to recover it on *habeas corpus*." Upon this point, in the case of *Green v. Campbell*, 35 W. Va. 698, 29 Am. St. Rep. 843, this court having expressed so decided an opinion, it may be regarded as no longer an open question in this state.

In the case under consideration, in direct opposition to the terms of his agreement, which had been acquiesced in for

more than six years, the relator asks the court to take this child from a home where peace, plenty, and harmony prevail, where she never knew neglect save from her father, and place her in the control of a stepmother who states that she is in poor health, and who exacted a promise from the relator before her marriage with him that he would not bring said infant child to his home to reside, and who, on one occasion at least, since her marriage left her husband and went home to her father's house with the intention of separating from him permanently and making her future home with her father.

. By this petition the relator seeks to compel said infant, against her wishes, to make her home with him, when the evidence shows that he is improvident, ill-tempered, and immoral, and where the future of the child would be any thing but pleasant. It is clear that the attachments of this child are with its grandparents, where she has been kindly nurtured and cared for in sickness and in health, and her best interests would be promoted by allowing her to remain in their custody; and following the ruling in this court in the case of *Green v. Campbell*, 35 W. Va. 698, 29 Am. St. Rep. 843, the judgment complained of must be reversed, the writ of *habeas corpus* dismissed, and the child, Thursby Cunningham, restored to the custody of her grandparents, William Barnes and Ruhama Barnes; and the cause is remanded to the circuit court of Ritchie in order that the requirements of this order may be complied with, and the defendant in error must pay the costs of this writ.

Reversed. Remanded. _____

PARENT AND CHILD.—CUSTODY OF MINOR CHILD ON HABEAS CORPUS: See notes to *State v. Smith*, 20 Am. Dec. 330-337; *Chapsky v. Wood*, 40 Am. Rep. 327-330; *Brooke v. Logan*, 2 Am. St. Rep. 183-187. That the welfare of the child is the controlling consideration in all instances, see authorities cited on pages 184 and 185 of the last-named note, and also *Merritt v. Swinley*, 82 Va. 433; 3 Am. St. Rep. 115; *Richards v. Collins*, 45 N. J. Eq. 283; 14 Am. St. Rep. 726; *Green v. Campbell*, 35 W. Va. 698; 29 Am. St. Rep. 843, and notes. Where a father has left his children under fourteen years of age to be supported and cared for by their grandmother, recognizing her right to their custody, and at various times declared his intention never to reclaim them, his abandonment of the children is sufficiently shown, and the grandmother is entitled to their custody and guardianship as against the father: *In re Vance*, 92 Cal. 195.

RANSOM v. HIGH.

[37 WEST VIRGINIA, 333.]

PARTITION IS MATTER OF RIGHT, and not of judicial discretion, and the only indispensable requisite to entitle the co-owner applying for partition to relief is that he shall show a clear legal title.

PARTITION—PLEADING.—A bill in equity for partition naming the proper parties need not make any formal deraignment of title, or any deraignment further than is necessary to describe and locate the land, and to show how the parties became co-owners, that they hold it together and undivided in certain proportions, and that they are entitled to partition.

PARTITION—COMMISSIONERS—REMOVAL.—Commissioners appointed to make partition, although appointed in the absence of some of the parties, cannot be removed except for good and sufficient cause, unless by consent of all parties.

PARTITION—REPORT OF COMMISSIONERS—SETTING ASIDE.—The report of commissioners to make partition may be set aside on the ground that they erred in making allotments, but will be confirmed unless the partition is based on wrong principles, or it is shown by a clear and decided preponderance of evidence that they have made a very unequal or unfair partition or allotment.

Kennedy, Littlepage, and Chapman, for the appellants.

H. C. and L. E. McWhorter, for the appellee.

333 HOLT, J. In November, 1889, plaintiff, N. B. Ransom, brought this 339 suit in equity in the circuit court of Kanawha county for partition between himself and defendant Mary C. High, wife of defendant Charles High, of a tract of land described in the title papers as containing one hundred and twelve acres, but found by actual survey in this case to contain only one hundred and eight and one-half acres. The defendants having been served with process, and not appearing, the circuit court, by decree of December 18, 1889, appointed three commissioners to go upon the land and divide the same into two parts, and set apart to plaintiff eight-ninth parts, and to defendant Mary High one-ninth. The commissioners went upon the land, made the partition and assignment, and reported to the court. Then defendants appeared, filing their demurrer and answer, plaintiff replying generally. The court overruled the demurrer, and set aside the proceedings in partition by the commissioners, as far as they had gone, and by decree of April 1, 1891, again appointed the same commissioners to make partition; but this time they were directed to set apart and assign to defendant Mary C. High four-twenty-sevenths and to plaintiff twenty-three-

twenty-sevenths thereof. This order the commissioners executed, and returned and filed a report and map showing the partition and assignment made by them in pursuance of this last decree. Defendant Mary C. High excepted to this report and partition, and, the cause coming on to be finally heard on June 30, 1891, the court overruled defendants' exceptions, and confirmed the partition as made by the commissioners, and the defendants appealed.

Appellants assign three grounds of error:

1. The court erred in overruling the demurrer to the bill. Partition is made by statute, and is a matter of right: Code, sec. 1, c. 79. "Tenants in common, joint tenants, and coparceners shall be compellable to make partition, and the circuit court of the county wherein the estate, or any part thereof, may be shall have jurisdiction in cases of partition, and in the exercise of such jurisdiction may take cognizance of all questions of law affecting the legal title that may arise in any proceedings." This was taken from act of November 28, 1786, which compelled partition among joint tenants, as well as other co-owners, and gave the common-law ⁸⁴⁰ writ *de partitione facienda* with forms adapted to the cases to be devised by the general court: See 1 Rev. Code, 1819, 359.

In *Wiseley v. Findlay*, 3 Rand, 361-370, 15 Am. Dec. 712 (1825), Judge Green says: "An application to a court of equity for partition does not seem to be an application to the sound discretion of the court, to be granted or refused according to the circumstances of the case, as in cases of specific performance and other cases, but to be due *ex debito justitiæ*. It is a remedy substituted for the difficult and perplexed remedy by writ of partition. I doubt whether a writ of partition has ever been prosecuted in Virginia. Indeed, the form of the writ has never been devised in the general court as the statute authorizing the writ directs. The only indispensable requisite to entitle the plaintiff to relief in such cases is that he shall show a clear legal title. If his title be disputed or doubtful, as if there be a question whether the deeds under which he claims are forged or not, or if his title depends on difficult and doubtful questions of law, which are emphatically proper for a court of law, the decree for partition is suspended until he establishes his title at law, not in a writ of partition, but by ejectment or other legal remedy; and if, in such proceeding, he establishes the genuineness of his title papers, or the question of law on which his title depends is

decided in his favor, he returns to the court of equity, and partition is made according to his established rights."

This led, in the revisal of 1849, taking effect July 1, 1850, to the section just quoted, giving the court of equity jurisdiction to take cognizance of all such legal questions: See note of revisers of code of 1849, p. 640, n. 1, and other notes to same chapter. The proceeding to compel partition is described in Bracton (1 Twiss' Bracton, 569 et seq.): "When an inheritance descended to more than one heir, and they could not come to an agreement among themselves concerning the division of it, a proceeding might be instituted to compel partition. A writ was for this purpose directed to four or five persons who were appointed justices for the occasion, and were to extend and appreciate the lands by the oaths of good and lawful persons chosen by ^{§41} the parties, who were called 'extensors,' and this extent was to be returned under their seals before the king or his justices. When partition was made in the king's court in pursuance of such extent there issued a *habere facias* (a writ of seisin) for each of the parceners to have possession": 2 Reeve on English Law, 106 (Finlason); Freeman on Cotenancy and Partition, c. 11.

The elements of the proceeding as here given remain to this day even in the court of equity. For proceedings and judgments at common law, see Booth on Real Actions, p. 243, c. 8. Upon the subject generally, see *Agar v. Fairfax*, 2 White and Tudor's Leading Cases in Equity, 4th ed., pt. 1, p. 865; *Pemberton v. Barnes*, L. R. 6 Ch. App. 685; Brett's Leading Cases in Modern Equity, *45 and notes; 2 Beach on Modern Equity Jurisprudence, 1055-1072; 1 Pomeroy's Equity Jurisprudence, secs. 140-185 et seq.; 1 Story's Equity Jurisprudence, 13th ed., 654-668; Allnatt on Partition, *passim* (1834); especially the thorough and useful work of Mr. Freeman on Partition, 2d ed., vol. 4, pt. 2; Minor's Institutes, p. 421, top page 1347, side page 1212; 2 Daniell's Chancery Practice, 134; Sander's Equity, 56-61, notes 571-575; 1 Barton's Chancery Practice sec. 99 et seq.; 1 Lomax's Digest, side pages 484-495; 1 Robinson's Forms, 205, 206; 3 Chitty's Pleading, 1390-1407; 17 Am. & Eng. Ency. of Law, 660.

This bill alleges in substance that plaintiff and defendant Mary C. High hold in fee and undivided the tract of land of one hundred and twelve acres situated in Kanawha county, etc.—Mary C. High, one-ninth, and plaintiff the residue, eight-ninths. Plaintiff gives the deraignment of title from

the common source, viz., Madison Burdett, who died seised in fee, in 1864, leaving Mary C. High, James V. Burdett, and Nancy E. Burdett, who took as his children and heirs at law leaving also his widow, Margaret L. Burdett. But such de-raignment of title was neither customary nor necessary at common law, and the practice and proceedings in equity were modeled on the proceedings of common law; and such de-raignment in equity is only used when and so far as necessary to show how the parties have come to be co-owners, and are entitled, and to present some collateral or incidental preliminary question, or as matter of description of the real estate: See Freeman on Cotenancy and Partition, 2d ed., sec. 486 et seq.; *Stuart v. Coalter*, 4 Rand. 74; 15 Am. Dec. 731.

642 Plaintiff gives a sufficient description of the property sought to be partitioned by allegations and title papers exhibited, and the respective size or amounts of the undivided interests. An allegation of a demand and refusal of partition is not made, nor is any necessary in equity: Freeman on Cotenancy and Partition, sec. 490. But plaintiff alleges and shows that he is entitled to partition, and prays that the same be made. Defendants claim that plaintiff obtained no title under his purchase and deed from Woodall, trustee, is not tenable. Such deed passed to the plaintiff the legal title and the equitable ownership also, as far as we can see; but, if not the latter, it is a matter which does not concern the defendants. The demurrer was properly overruled.

Second error assigned: That the allegations of the bill are denied by the answer, and are not proved by the exhibits. The bill alleges, among other things, that after the death of her father, Madison Burdett, in 1864, Nancy E. Burdett, one of his three heirs at law, died in May, 1886, without issue, whereby defendant Mary C. High, as one of the heirs of Nancy, became and was invested with title to one-third of one-third, or one undivided ninth, part of said one hundred and twelve acres of land; so that the same is now held entirely by the said Mary and this plaintiff in the following proportion, viz., Mary C. High, one undivided one-ninth, and this plaintiff, eight undivided one-ninth parts. Defendants, in their answer, "aver that the said Mary C. High is entitled to one-ninth undivided interest in said real estate, as the heir of her said sister." If any further proof were needed on this point—and the allegation is defective—it is secured and helped out by the answer.

Third error assigned: That the court erred in overruling defendant's exceptions to commissioners' report. Nancy E. Burdett died, unmarried and intestate, in May, 1886, leaving no child nor descendants of any child, but leaving her mother, her brother, James V. Burdett, and her sister, Mary C. High, her heirs at law. Defendant Mary C. High, and her husband, had before that, viz., by deed dated 24th January, 1880, in consideration of five hundred dollars, sold and conveyed her interest (one-third) in the real estate of which her father, Madison Burdett, ⁸⁴³ had died seised, to her mother, Margaret Burdett, and Margaret Burdett and her son, James V. Burdett and wife, after the death of Nancy, and after the conveyance from the defendant Mary C. High, by deed dated 8th September, 1887, conveyed the said one hundred and twelve acres, known as the "Madison Burdett Land" in Kanawha county, on the middle fork of Tupper's creek, describing it by adjoining owners, to E. A. Woodall, trustee, in trust, to secure to F. W. Miller the payment of one note executed and payable 1st September 1888, for the sum of two hundred and twenty dollars, providing, in default of payment, for a sale to be made, etc. Under this trust deed Woodall sold the one hundred and twelve acres—apparently the whole of it; and plaintiff became the purchaser, at the price of two hundred and sixty-five dollars, and the trustee, by deed dated 27th April, 1889, conveyed the same to plaintiff, N. B. Ransom.

Before defendants had appeared, and while they were still in default, the circuit court, by decree of 18th December, 1889, appointed three commissioners to make partition. They made partition, and returned their report, which does not appear in this record. Then defendants appeared and filed this answer, claiming one-ninth as the heir of their sister, Nancy, to which she had the legal title, and that they were also entitled equitably as such heir of Nancy to one-third of one-ninth, making their whole interest in the tract of one hundred and twelve acres four-twenty-sevenths.

The cause came on again to be heard in April, 1891, on papers formerly read, answer of defendants, and report of commissioners. Thereupon the court set aside the report, and again appointed the same commissioners to make partition, giving defendants all they claimed, and the commissioners made the same partition as they had made at first; and to this defendants excepted.

In this decree the court decides that defendant Mary C.

High is the owner of and entitled to four-twenty-sevenths undivided interest in the one hundred and twelve acres, and that plaintiff is the owner of and entitled to twenty-three-twenty-sevenths undivided interest in said land, and, ⁸⁴⁴ it appearing that both owners desire their interest in the land set apart to them, appoints the same three commissioners, who are directed to go upon the land and partition the same among the parties entitled thereto, if they find the land susceptible of partition in kind, and in the proportion to which said parties may be entitled; that is to say, that they set apart to plaintiff twenty-three-twenty-sevenths of the said one hundred and twelve acres, and to the defendant Mary C. High four-twenty-sevenths thereof. In such partition said commissioners shall take into consideration the quantity and value of the several parts so to be set apart and assigned, so that each party shall receive an equitable proportion in value of said tract of land in the proportions aforesaid.

The commissioners made and returned their report, from which it appears that the tract contained, not one hundred and twelve, but one hundred and eight and one-half acres. They set off by metes and bounds fifteen acres, as equal in value to four-twenty-sevenths of the whole, to defendant, Mary C. High, and the remainder, ninety-three and one-half acres, to plaintiff, as being equal in value to twenty-three-twenty-sevenths of the whole. It appears that under the first decree they had set off to Mary C. High this same fifteen acres as and for her one-ninth or three-twenty-sevenths part. In their second report they call attention to this fact, and justify their change of opinion by the fact that since their first report a double log barn had been removed from the ninety-three and one-half-acre part, and about two hundred panels of fence. But they say again, in conclusion: "Your commissioners, after carefully considering the same, decided that the fifteen acres were fully equal in value to four-twenty-sevenths of the whole of the one hundred and eight and one-half acres, as of 22d of May, 1891, and that it is an equitable and just partition," etc.

Under this assignment, the first point made by the defendants is that the court erred in sending back the same commissioners. If the defendants had appeared in time, they had the same right to nominate and suggest to the court the persons from whom they wished the commissioners to be chosen that the plaintiff had; but, being once appointed, ⁸⁴⁵

they are not removed, except for good and sufficient reason, unless by consent, so that the action of the court in that regard was proper, and according to the usual course.

The second point is that the commissioners did not again go upon the land at all, but took their old report, in which they had said that the fifteen acres was three-twenty-sevenths of the value of the one hundred and eight and one-half acres, and now by the second report say that the same fifteen acres is equal to four-twenty-sevenths of said tract in value. As the jurors were always sworn in the real action at common law, so are the commissioners in equity with us always sworn, and the report ought to show that fact; and the interlocutory decree for partition ought to direct that they be sworn before acting. It is usual to return a certificate of the oath taken with the report. The first report returned is not in the record. The second report, as copied in the record, contains no such certificate. If they were sworn in fact before acting, that is sufficient. No objection is made or exception taken on that ground, and it is fair to presume that they were sworn before acting: See *Massey v. Massey*, 4 Har. & J. 144; *McClanahan v. McClanahan*, 14 S. W. Rep. 496 (Ky., Oct. 9, 1890); *Smith v. Moore*, 6 Dana, 417; see, also, *Wilcox v. Cannon*, 1 Cold. 369; *Bledsoe v. Wiley*, 7 Humph. 507; *Jordan v. McNulty*, 14 Col. 280; *Winship v. Crothers*, 20 Ind. 455; see 4 Minor's Institutes, pt. 2, top page 1349; Sanders' Equity.

In this report the commissioners say that, having gone upon the land, etc., under the first order, "they again, under the order of April 1, 1891, went upon the land on April 22, 1891, and, after carefully examining the same, laid off the fifteen acres on the lower end," etc., "as the portion we assigned to Mary C. High, being equal in value to four-twenty-sevenths parts of the whole," etc., thus stating explicitly that they again went upon the land. The question of ownership, and what were the undivided shares or interests, had been determined by decree of April 1, 1891. The commissioners had nothing to do but execute the order, make the partition and allotments according thereto, and return a report of what they had done, showing that the ⁸⁴⁶ property had been divided, and to whom the several parts have been assigned or allotted, returning with their report all the evidence taken or maps or deeds used and read and made.

The report of the commissioners is not final; it may be set aside by the court. But where the court is asked to set aside

the action of the commissioners on the ground that they erred in making allotments, whereby an unequal partition has been made, it will not grant the relief asked except in clear cases—cases in which partition is based on wrong principles, or it is shown by a clear and decided preponderance of evidence that the commissioners have made a very unequal or unfair partition and allotment: See Freeman on Cotenancy and Partition, sec. 525, and cases cited.

Commissioners, when once they are appointed, no matter by whom nominated, are commissioners for all the parties, and owe to them and the court the duty of fairness and impartiality: See Allnatt on Partition, top page 46, side page 113. I do not see how the commissioners could have made a different partition than according to their opinion of value after going upon the ground the second time.

The court, therefore, did not err in overruling defendants' exceptions, and in confirming the partition reported and returned. By section 8, chapter 117, of the code, conveyances are no longer necessary to pass the legal title in suits in equity in partition. The record of partition, duly recorded in the county clerk's office, has the effect, but deeds are still frequently required and used, because they are generally more convenient muniments of title.

In conclusion, we are of opinion that the circuit court committed no substantial error in the orders and decrees complained of, and that they should be affirmed.

Affirmed.

PARTITION—REQUISITES OF PETITION.—A bill in equity for partition must state the complainant's own title, and the title of the defendant, whereby it shall appear that they do claim to hold the land as cotenants: *Ramsay v. Bell*, 2 Ired. Eq. 209; 42 Am. Dec. 163; *Contra: Rutherford v. Jones*, 14 Ga. 521; 60 Am. Dec. 655, where it was held that the plaintiff need not set forth his title to the land in full. So, also, it was said in *McGill v. Buie*, 106 N. C. 242, that the court would treat allegations in regard to the relationship of the parties, intended to show from and through whom title to the land was derived, etc., as useless and unnecessary.

PARTITION.—REPORT OF COMMISSIONERS may be shown by parol evidence to be unequal, as a ground for having it set aside: *Riggs v. Dickinson*, 2 Scam. 437; 35 Am. Dec. 113.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

LEWIS v. STATE.

[96 ALABAMA, 6.]

CRIMINAL LAW—EVIDENCE—OPINION AS TO CAUSE OF DEFENDANT'S FLIGHT.

For the purpose of rebutting the inference arising from the flight of an accused, the mere opinion of a witness that "the defendant seemed afraid of" the father of the deceased, is incompetent.

HOMICIDE—TESTIMONY OF DEFENDANT'S INTENTION NOT COMPETENT.—One accused of homicide cannot be allowed to introduce testimony as to the uncommunicated intention with which he did the act which inflicted the fatal wound.

HOMICIDE.—AN ACTUAL INTENTION TO TAKE LIFE IS NOT AN ESSENTIAL ELEMENT OF MANSLAUGHTER in the first degree. Therefore an instruction to the effect that a defendant should be found guilty of that offense if he intentionally did an act which was calculated to produce, and did produce, fatal results, is not open to exception.

HOMICIDE—ABSTRACT INSTRUCTIONS PROPERLY REFUSED.—If, in a trial for murder, no testimony is introduced which tends to show that the killing was accidental, the court is justified in refusing to instruct the jury upon that hypothesis.

HOMICIDE—FAILURE TO INSTRUCT AS TO DEFENDANT'S TESTIMONY, WHEN NOT ERROR.—The mere fact that, in a trial for homicide, the court has omitted, in its general charge, to instruct the jury on the hypothesis that the defendant's testimony might be true, affords, in the absence of a special request for such instruction, no ground for an exception.

TRIAL—INSTRUCTIONS EXPLAINING ANOTHER PORTION OF A CHARGE, WHEN PROPER.—Written instructions given in a criminal trial, at the request of the defendant, may properly be explained by supplementary instructions orally requested by the counsel for the state.

HOMICIDE—INSTRUCTION AS TO REASONABLE DOUBT, ERROR IN REFUSING. It is reversible error to refuse to instruct the jury, in a trial for homicide, that if they are not satisfied beyond a reasonable doubt that when the defendant did the act which caused the fatal wound he in-

tended to kill the deceased, or that the act was one from which death or great bodily harm would ordinarily, or in the usual course of events, follow, they must acquit the defendant of manslaughter in the first degree.

INDICTMENT for the murder of Henry Lovelace "by striking him with a brick or brickbat." The defendant was convicted of manslaughter in the first degree. Just before the infliction of the blow which caused the death of Lovelace, the defendant had dismounted from the wagon in which he had been driving with the deceased and another boy, telling the latter to drive on. The defendant, when the wagon was some distance away, started to catch up with it, calling to the driver to stop, which he did; and when the defendant had nearly reached the wagon the deceased snatched the reins from the other boy, and drove on. The defendant, upon the failure of the deceased to listen to his request to stop the wagon, picked up a piece of brick, and threw it at the deceased, striking him above the right ear. Death ensued about a week afterwards. On the part of the defendant, evidence was given that, when the brick struck the deceased, he said he did not intend to hit him, and added: "Hush, Henry, don't cry; I did not go to hurt you"; that he also told the mother of the deceased that he had so struck the boy, but did not intend to do so; that a few days after the death of the boy, upon hearing that the boy's father was hunting for him, he went to another county, and that, when the father followed him there, he took flight, and did not return for some time. One of defendant's witnesses was asked "if the defendant seemed afraid of Lovelace" (the father of the deceased). The state objected to the question, and, the court having sustained the objection, the defendant excepted. While the defendant was on the stand, testifying in his own behalf, he was asked this question by his counsel: "What was your intention when you pitched that piece of brick at the wagon"? The state objected, and, the court having sustained the objection, the defendant excepted. The court instructed the jury that, "if the act was calculated to take life, the killing was manslaughter in the first degree," and the defendant excepted to this part of the charge. Exception was also taken to the court's refusal to charge the jury on the hypothesis that the killing was accidental, the reason assigned by the judge being that there was no evidence of that character. The bill of exceptions also contained the following recital: "When the court had finished charging the jury, the

defendant then and there excepted to the general charge, for the reason that, while the court instructed the jury upon the hypothesis that the testimony of the state's witnesses might be true, the court did not instruct the jury upon the hypothesis that the testimony of the defendant or the defendant's witnesses might be true." The following written charges were asked for by the defendant, and the refusal of the court to grant them was excepted to: 1. "The fact that the defendant is charged by the grand jury with the commission of this crime is no evidence of his guilt; the finding of the indictment only gives permission to this court to inquire into his guilt; and, unless the evidence given from the stand satisfies the minds of the jury to a moral certainty that the defendant committed this crime intending to kill, the jury must acquit him." 6. "It is the duty of the jury to give the defendant the benefit of every reasonable doubt which may arise in the consideration of the evidence in this case; and if, after a fair and full consideration of this evidence, the minds of the jury are left in a state of doubt and uncertainty as to whether the defendant intended to kill the deceased, or whether the killing was accidental, then the jury should give the defendant the benefit of such reasonable doubt and acquit him." 22. "If the jury is not satisfied beyond a reasonable doubt that, when the defendant threw the piece of brick, he threw it with malice, and intended to kill Henry Lovelace, they must acquit him of murder." 23. "If the jury are not satisfied beyond a reasonable doubt that, when the defendant threw the piece of brick, he intended to kill Henry Lovelace, or that the act was one from which death or great bodily harm would ordinarily, or in the usual course of events, follow, they must acquit the defendant of manslaughter in the first degree." 26. "The law in no case requires the greatest care that can be used. It only requires a reasonable precaution, such as is usually and ordinarily taken in the like cases; which has been by long experience found to answer the ends; for such conduct shows that the accused is regardful of social duty, and is free from all manner of guilt." Among the written charges requested by the defendant, the following were given: 2. "Every one charged with the commission of a crime is presumed to be innocent until his guilt is established; and the evidence to induce his conviction should not be a mere preponderance of probabilities, but it should be so convincing as to lead the minds of the jury to the conclusion that the defendant can-

not be guiltless." 10. "'That, unless the evidence against the prisoner should be such as to exclude, to a moral certainty, every supposition but that of his guilt of the offense imputed to him, they must find him not guilty.'" The counsel for the state then made an oral request for the following explanatory instructions in regard to the above, and the court having granted the instructions, the defendant excepted to both of them. 1. "'The evidence to induce his conviction should not be a mere preponderance of probabilities, but it should be so convincing as to lead the minds of the jury to the conclusion that the defendant cannot be guiltless'—only means that they should be satisfied of his guilt beyond all reasonable doubt." 7. "'That unless the evidence against the prisoner should be such as to exclude, to a moral certainty, every hypothesis but that of his guilt of the offense imputed to him, they must find the defendant not guilty'—only means that they must be satisfied of the defendant's guilt beyond all reasonable doubt." The court gave these instructions, at the oral request of the solicitor; and the defendant separately excepted to the giving of each of the explanatory charges.

J. T. Ellison, for the appellant.

William L. Martin, attorney general, for the state.

• McCLELLAN, J. The state proved the flight of the defendant as tending to establish guilt. Defendant sought to rebut the inference afforded by the fact of flight by showing that flight was due to defendant's fear that Lovelace, the father of the deceased, would summarily avenge the homicide, and not a consciousness of guilt. It was of course competent to prove defendant's personal fear to explain his flight, but this could not be done by the testimony of a witness that, "the defendant seemed afraid of Lovelace," a mere "opinion of the witness," ¹⁰ based either on the conduct or declarations of the defendant himself, or else unsupported by fact at all": *Poe v. State*, 87 Ala. 65; *McAdory v. State*, 59 Ala. 92; *Gassenheimer v. State*, 52 Ala. 313.

The proposed testimony of the defendant as to the intention with which he pitched the brick which inflicted the fatal wound was properly excluded. A witness cannot testify to the uncommunicated intention with which he did an act: *Wheless v. Rhodes*, 70 Ala. 419; *Burke v. State*, 71 Ala. 377; *Whizenant v. State*, 71 Ala. 383; *Stewart v. State*, 78 Ala. 436;

Fonville v. State, 91 Ala. 39; *Baldwin v. Walker*, 91 Ala. 428; *East Tennessee etc. Ry. Co. v. Davis*, 91 Ala. 615.

That part of the court's general charge to which the first exception was reserved is in effect, that if one intentionally does an act which is calculated to take life, and death is produced by it, the homicide is manslaughter in the first degree. This is the law. An actual intention to take life is not an essential element in this offense, or indeed in murder. The voluntary setting in motion or application of unlawful force, or the doing of an act greatly dangerous to the lives of others, whereby death ensues, will suffice to supply the legal elements of evil intent, however free the action may be from actual purpose to kill. These principles justify the charge given by the court, and its refusal to give charges 1 and 22, requested by the defendant: *Harrington v. State*, 83 Ala. 9; *Williams v. State*, 83 Ala. 16; *Hornsby v. State*, 94 Ala. 55; *Mitchell v. State*, 60 Ala. 29; *Washington v. State*, 60 Ala. 10; 31 Am. Rep. 28; *Nutt v. State*, 63 Ala. 180; *Hampton v. State*, 45 Ala. 82; *McManus v. State*, 36 Ala. 285.

It was not controverted that the defendant intentionally threw, or "pitched," the brick which produced death, at the deceased. Whether he intended to kill deceased or not, that result is chargeable to his voluntary act, and not to misadventure. There being thus no testimony tending to show that the killing was "accidental," the court rightfully refused to instruct the jury on that hypothesis: *Walker v. State*, 85 Ala. 7; 7 Am. St. Rep. 17. Any charge in line with defendant's request in this connection would have been abstract, and, hence, even had such instruction been requested in writing, which it was not, should have been refused: *Reese v. State*, 90 Ala. 624; *East Tennessee etc. Ry. Co. v. Watson*, 90 Ala. 41.

If it was apprehended that the defendant would be prejudiced by the failure of the presiding judge to charge the jury on the hypothesis that defendant's evidence might be true, at least request should have been made that he so charge them. This omission, very clearly, we think, afforded ¹¹ no ground for an exception to the court's general charge as given. Whether such request should, if made, have been complied with we need not decide. Possibly defendant should have asked special written charges covering the point, the court having charged the jury as to their duty in the event they found the fact in line with the tendencies of the state's evidence.

Charge 6 refused to defendant is manifestly distinguishable from the charge which this court held in *Elmore v. State*, 92 Ala. 51, should have been given. It is easily open to a construction which would subject it to the objections held fatal to a similar charge in the case of *Alabama etc. Ry. Co. v. Hill*, 93 Ala. 514; 30 Am. St. Rep. 65. Moreover this charge is, for reasons stated, in another connection, abstract, in that there is no evidence in that case which tends to show that the killing was accidental, in a legal sense, and it is misleading, in that the jury would naturally have been induced by it to the conclusion that the defendant could not be guilty unless he had the purpose to kill the deceased. It may be that "the law in no case requires the greatest care that can be used," as stated in charge 26, requested by the defendant, but in all cases we apprehend it does require greater care than any phase of the evidence found in this record shows defendant to have exercised, much greater care than can possibly be implied from any method of heaving a brickbat at and against a small boy; and to have given this charge could have served no other end than to confuse and mislead the jury.

It was entirely competent and proper for the trial court to explain, not to qualify, limit, or modify the written charges given for defendant in the manner shown by the record: *Alabama etc. Ry. Co. v. Moody*, 92 Ala. 279; *Lowe v. State*, 88 Ala. 9; *Barnard v. State*, 88 Ala. 111; *McKleroy v. State*, 77 Ala. 95.

Charge 23 requested for the defendant is a correct exposition of the law as expounded in *Williams v. State*, 83 Ala. 16, and should have been given.

For the error committed in its refusal, the judgment must be reversed, and the cause will be remanded.

Reversed and remanded.

CRIMINAL LAW.—PRESUMPTION OF GUILT DOES NOT ARISE FROM FLIGHT OF ACCUSED if the flight was for the purpose of escaping the violence of a mob: *State v. Ma Foo*, 110 Mo. 7; 33 Am. St. Rep. 414.

HOMICIDE—DEATH CAUSED BY ACT CALCULATED TO PRODUCE FATAL RESULTS.—An unmistakable intent to produce death is not essential to establish murder: *State v. Hoover*, 4 Dev. & B. 365; 34 Am. Dec. 383; *Brassfield v. State*, 55 Ark. 556. One who fires recklessly into a crowd and kills another is guilty of murder, though he fired without any special purpose: *Golliher v. Commonwealth*, 2 Duvall, 162; 87 Am. Dec. 493. One who shoots at another in fun is responsible for the consequences of his acts. The law implies malice from the reckless trifling with human life: *Collier v. State*, 39 Ga. 31; 99 Am. Dec. 449. So, too, manslaughter is committed by one who unintentionally kills another while endeavoring to frighten him with a revolver: *State v. Hardie*, 47 Iowa, 647; 29 Am. Rep. 496; by one who

brandishes a loaded and self-cocking revolver in a room where there are other persons, and accidentally kills one of them: *State v. Emery*, 78 Mo. 77; 47 Am. Rep. 92; *State v. Vines*, 93 N. C. 493; 53 Am. Rep. 466; by one who carelessly handles a loaded shotgun, and, without examining to see whether it is loaded, points it at another, and shoots him: *State v. Morrison*, 104 Mo. 638. So a father guilty of the cruel and immoderate beating of his child, eight years of age, which results in death, is not entitled to an instruction that the jury, before convicting the accused of murder, must believe that at the time of the chastisement he had in mind a deliberate purpose to kill: *Powell v. State*, 67 Miss. 119. The infliction of a mortal wound with a deadly weapon or an instrument likely to cause death raises a presumption of malice which must be rebutted by the accused, in order to reduce the killing to a grade of homicide lower than that of murder: *Commonwealth v. York*, 9 Met. 93; 43 Am. Dec. 373; *McWhirt's case*, 3 Gratt. 594; 46 Am. Dec. 196; *Hornsby v. State*, 94 Ala. 55; *State v. Welch*, 36 W. Va. 690; *Power v. People*, 17 Col. 178; *Boatwright v. State*, 89 Ga. 140; *People v. Bushon*, 80 Cal. 160; *State v. Whitson*, 111 N. C. 695.

HOMICIDE—ABSTRACT INSTRUCTIONS PROPERLY REFUSED.—It is not the duty of the court to charge the jury upon a degree of homicide to which the evidence does not apply: *Gardner v. State*, 90 Ga. 310; 35 Am. St. Rep. 202; *Hicks v. State*, 25 Fla. 535; *Commonwealth v. Buccieri*, 153 Pa. St. 535; *Habel v. State*, 28 Tex. App. 588; *Caldwell v. State*, 28 Tex. App. 566; *Angus v. State*, 29 Tex. App. 52; *Jones v. State*, 52 Ark. 345; *Jackson v. State*, 88 Ga. 784; *State v. Henson*, 106 Mo. 66; *State v. Estep*, 44 Kan. 572. On the other hand, such instruction should be given when the evidence raises the issue as to whether the defendant may only be guilty of a lower degree of homicide than that named in the indictment: *Meuly v. State*, 26 Tex. App. 274; 8 Am. St. Rep. 477; *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96; *Alexander v. State*, 25 Tex. App. 260; 8 Am. St. Rep. 438; *Tillery v. State*, 24 Tex. App. 251; 5 Am. St. Rep. 882; *Croom v. State*, 85 Ga. 718; 21 Am. St. Rep. 179; *Campbell v. Commonwealth*, 88 Ky. 402; 21 Am. St. Rep. 348; *Carter v. State*, 30 Tex. App. 551; 28 Am. St. Rep. 944; *State v. Crabtree*, 111 Mo. 136; *State v. Young*, 99 Mo. 666; *State v. Rash*, 12 Ired. 382; 55 Am. Dec. 420; *State v. Johnson*, 8 Iowa, 525; 74 Am. Dec. 321.

HANDLEY v. STATE.

[96 ALABAMA, 43.]

HOMICIDE—KILLING MISDEMEANANT SOLELY TO PREVENT HIS ESCAPE NOT JURIFIABLE.—Neither an officer charged with the duty of arresting a misdemeanor, nor a private person, who is lending his aid to effect the arrest, at the officer's request, is justified in killing such misdemeanor solely for the purpose of preventing his escape.

HOMICIDE—PREMEDITATION, WHEN PRESUMED.—The existence of the formed design necessary to constitute the crime of murder is presumed from the intentional use of a deadly weapon with a fatal result.

HOMICIDE—CHARACTER OF DEFENDANT—INSTRUCTIONS PROPERLY REFUSED. When, on the trial of one accused of murder, evidence has, without objection, been admitted to the effect that the defendant had told the witness, on the morning of the day of the homicide, that "he had killed

five men while guarding convicts," and that, "on the previous night, while the defendant and the witness were near the dwelling-house of the deceased, he, the defendant, would have shot the deceased, if he had shown his head at the door," it is not error to refuse instructions which assert that there was no evidence that the defendant "ever killed any other person," "ever shed any other person's blood," or "liked to shed man's blood."

THE appellant was convicted of murder in the first degree. It was shown, on the part of the state, that the defendant, upon approaching the place where the deceased was standing, had pointed a pistol at him, telling him to surrender and throw up his hands, and that, when the deceased started to run away, the defendant shot him. The defendant introduced evidence to the effect that he had gone, at the request of a deputy sheriff, to assist in arresting the deceased upon a charge of beating his wife; that the deceased, when he saw the defendant, came towards him, saying, "This is one of the damned rascals who want to arrest me"; that the defendant told him to stop, and, when he continued to advance, and was proceeding to draw a knife, shot and killed him. Exception was taken to the refusal of the court to give the following charges, asked for by the defendant: 7. "If the defendant was requested to aid the officers in executing the warrant of arrest, and was attempting to do so, and the deceased fled or started to run or escape from arrest, and the defendant shot the deceased to prevent his escape, then the defendant would be guilty of murder or manslaughter, according to the peculiar circumstances of the case; but it is not murder unless the killing was done in pursuance of a formed design to take the life of deceased." 8. "If the defendant was requested or told by the deputy sheriff to aid, or assist, or help in arresting the deceased, and if he, in pursuance of such request, attempted to arrest the deceased, who thereupon fled, and the defendant shot him to prevent his escape, then you may look to this fact, under the law, to reduce the offense to manslaughter; and, unless the defendant shot in pursuance of a formed design to take the life of the deceased, he cannot be convicted of murder." 9. "There is no evidence before the jury tending to show that the defendant ever killed any other person, or five other persons, and the jury must not consider any statement to that effect, made by the solicitor in argument." 10. "There is no evidence in this case that the defendant ever shed any other man's blood, either negro or white, and the jury must disregard all statements on that

subject, made by the solicitor in argument." 11. "There is no evidence that the defendant liked to shed man's blood."

S. W. John and A. P. Longshore, for the appellant.

William L. Martin, attorney general, for the state.

⁵⁰ McCLELLAN, J. On the facts hypothesized in charges 7 and 8, refused to the defendant, he was clearly guilty of murder. An officer charged with the duty of arresting a misdemeanant has no more authority to shoot him down to prevent an escape than he would have the right to kill any indifferent person who was casually walking or running away from the place where the officer happened to be; and, of course, a private person, who was lending aid in effecting the arrest at the request of the officer, as was the defendant here, according to one aspect of the evidence, would certainly have no more right than the officer himself. On the facts so postulated, the jury could not be justified in finding the defendant guilty of manslaughter only, as these charges would have authorized them to do; nor would they have been authorized to conclude that defendant did not entertain the formed design to kill, which is necessary in murder, since the law presumed such formed design from the facts that the defendant intentionally used a deadly weapon with a fatal result—and this, not in an exigency which justified or even palliated the act, but solely for the purpose of preventing the escape of a misdemeanant—an end which the law does not admit of being subserved by the taking of life, and which constitutes no excuse, justification, or palliation for the taking of life. Both these charges were, therefore, not only misleading and confusing in their tendencies, but affirmatively incorrect and unsound statements of the law, and each of them was properly refused.

There was evidence to the effect that, on the morning of the day of the homicide, when a witness and defendant were going to Calera to sue out the warrants for the arrest of the deceased, "defendant told witness that he had killed or shot five (5) men while he was guarding convicts for Mr. Jackson at Blount Springs in Blount county, Alabama; and also that on the previous night, while defendant and witness were near the dwelling-house of deceased, if deceased had shown his head at the door, he, defendant, would have shot him." It is most clear to us that this was evidence tending in some degree to show that defendant had killed other persons than

deceased, or five persons other than deceased, and that defendant had shed the blood of other men than that of deceased; and it was a fair inference to be drawn in argument and by the jury, from the facts which this evidence tended to establish, that defendant had shot five other men, and would have causelessly shot deceased through the window of his house, ⁵¹ had the opportunity to do so been presented; that "the defendant liked to shed man's blood." Charges 9, 10, and 11, which respectively asserted that there was no evidence that defendant "ever killed any other person," etc., "ever shed any other man's blood," or "liked to shed man's blood" were therefore well refused. And it is of no consequence in this connection that the declarations of the defendant as to shooting or killing five men at Blount Springs might have been excluded from the jury as irrelevant testimony, had objection been made to it. No objection was made, and it was treated as competent evidence.

Counsel do not insist upon the exceptions reserved to the court's action in refusing to give several other charges requested by the defendant, and we will therefore not discuss those rulings. The instructions have, however, been carefully examined, and it will suffice to say that they are patently either affirmatively bad, or, when referred to the evidence, involve such tendencies to mislead the jury as to justify their refusal.

The judgment of the circuit court is affirmed.

HOMICIDE.—KILLING OF MISDEMEANANT WHO OFFERS ARMED RESISTANCE to an officer having a warrant for his arrest is justifiable homicide: *State v. Garrett*, 1 Winst. 144; 84 Am. Dec. 359; as also is a homicide, when necessarily committed in a lawful attempt to arrest a person who has committed a felony: *Thomas v. Kinkead*, 55 Ark. 502; 29 Am. St. Rep. 68; *People v. Adams*, 85 Cal. 231. But the killing of a misdemeanor to prevent his escape is not justifiable, though no other means of prevention are available: *Thomas v. Kinkead*, 55 Ark. 502; 29 Am. St. Rep. 68. See, however, *Reneau v. State*, 2 Lea, 720; 31 Am. Rep. 626.

HOMICIDE.—INTENTIONAL USE OF DEADLY WEAPON, PRESUMPTION OF MALICE FROM: See cases cited in the note to *Lewis v. State*, ante, p. 75.

SPRINGFIELD v. STATE.

[96 ALABAMA, 81.]

CRIMINAL TRIALS—PROVINCE OF COURT AND JURY.—If one of the defendant's counsel in a criminal trial, tells the jury that they are "above the court and the supreme court in their right to decide the case," it is proper for the trial judge to obviate any erroneous impression which might be produced by the remark, and to instruct the jury that they are judges of the facts but not of the law.

HOMICIDE—SELF-DEFENSE, CORRECT INSTRUCTIONS AS TO LAW OF.—An instruction to the effect that, in the system of self-defense established by the law, "no balm or protection is provided for wounded pride or honor in declining combat, or sense of shame in being denounced as cowardly" is a correct exposition of the law.

HOMICIDE.—DRUNKENNESS ON THE PART OF THE ACCUSED at the time of committing a homicide may have the effect of reducing the offense from murder to manslaughter, if shown to have been so excessive as to render him incapable of forming the design to take life, but there is no principle of law which authorizes drunkenness to be invoked as an excuse for crime, or as a ground for enlarging the right of self-defense.

HOMICIDE—DUTY TO RETREAT—BURDEN OF PROOF.—When the intentional killing of the deceased by the defendant has been shown by the uncontradicted testimony of the state, the burden is then cast upon the defendant to show not only a pressing necessity, actual or reasonably apparent, to take the life of the deceased in self-defense, but also his inability to retreat safely without apparently increasing his peril.

CRIMINAL LAW—GOOD CHARACTER AS A DEFENSE.—Proof of the good character of the accused is admissible in all criminal cases, not only where doubt exists on the other proof, but also to generate a doubt; but an instruction should not be granted, which would leave the jury to infer that the good character alone of one accused of murder might, if proved to their satisfaction, raise a reasonable doubt that the killing was done by the defendant with a criminal intent.

HOMICIDE—SELF-DEFENSE—HOSTILE DEMONSTRATIONS BY DECEASED.—The defendant in a prosecution for homicide cannot complain of the refusal of the court to give an instruction which assumes, as a matter of law, that the mere drawing of a knife by the deceased in a hostile manner, created an impending imperious necessity for the defendant's slaying him in self-defense. It is not enough that the deceased had at hand the means for effecting a deadly purpose with respect to the defendant, but it must also appear, by some act or demonstration of the former, that he intended at the time of the killing, to carry out his purpose, or the circumstances must be such as to create a reasonable belief in the mind of the slayer, that it was necessary to deprive his assailant of his life to save his own.

HOMICIDE—ABILITY OF DEFENDANT TO RETREAT SAFELY A QUESTION FOR THE JURY.—An instruction which assumes as a matter of law that, on the facts therein postulated, the defendant in a prosecution for murder could not have retreated without endangering his life, is properly refused.

HOMICIDE—SELF-DEFENSE. WHAT IS.—Self-defense is the resistance of force or seriously threatened force, either actually pending or reasonably

apparent, by force sufficient to repel the actual or apparent danger and no more. If it goes beyond this, there is guilt which is not excusable or justifiable.

HOMICIDE—SELF-DEFENSE, CIRCUMSTANCES INSUFFICIENT TO SUSTAIN PLEA OF.—In a trial for murder, if the whole evidence, including the defendant's own testimony as to his means and opportunity for avoiding, without danger to himself, the necessity of slaying the deceased, can lead to no other conclusion but that, having merely to choose between committing the homicide or turning loose a "wild and skittish mule," he elected to take the life of the deceased and hold on to the mule, the conditions necessary to make out a case of self-defense are not established.

WITNESSES, CREDIBILITY OF, A QUESTION FOR THE JURY.—Since it lies entirely with the jury to determine what weight should be given to the testimony of a witness who is shown to have made contradictory statements, the court may properly refuse an instruction to the effect that proof of the making of such statements by a witness goes to his credibility.

INDICTMENT for murder. The deceased, Wilder, on the day of the homicide, had been attending court as a witness in a case in which the defendant Springfield, and one Jones, had also been summoned to testify. On the way home Jones occupied a seat in Wilder's wagon until they had driven several miles from the place of the trial. He then left the wagon and mounted on the defendant's mule behind the defendant, but after a short while returned to the wagon.

The state introduced evidence to the effect that a quarrel arose soon afterwards between Jones and Wilder's brother-in-law, who was also on the wagon; that Jones was knocked out of the wagon during the scuffle which ensued; and that, about at this moment, the defendant drew near and killed Wilder with a shot from his pistol.

The testimony given on the part of the defendant was to the effect, after Jones had fallen to the ground, the defendant dismounted from his mule, described as "young, wild, and skittish," and, while holding the reins with his left hand was proceeding to lift Jones from the ground when he looked up and saw Wilder with a knife in his hand and apparently about to stab the defendant; that the defendant tried to ward off the blow with his left arm and received a slight wound in the shoulder; that the defendant seeing Wilder making preparation for another blow drew his pistol and fired at him before he could get time to inflict the second stroke. The counsel for the state asked the defendant, on his cross-examination, why he did not turn the mule loose, and get out of the way of the knife, and he replied that "he was afraid the

mule would get away from him." Evidence of the defendant's good character was also introduced. It was also testified that he had been drinking liquor at the town where the trial was held and on the way home. Exceptions were taken by the defendant to the following portion of the judge's general charge: "1. One remark of counsel in addressing you, gentlemen, might mislead you. It was something to the effect that you are above this court and the supreme court in your right to decide this case. The statement, gentlemen, is only partially correct. So far as determining what the facts are, what the evidence shows, it is true; for you are the sole judges of the facts, and in judging them you are above and beyond every other tribunal, personage, or agency; but so far as determining what the law is which is to be applied to the facts, and by such application a true verdict to be reached, the statement of the counsel is not correct." "2. In the system [of self-defense] so established no balm or protection is provided for wounded pride or honor in declining combat, or sense of shame in being denounced as cowardly. Such thoughts are trash, as compared with the inestimable right to live." "3. If the defendant did not exercise prudence, by reason of indulgence in strong drink, or for other cause, and therefore formed an unjustifiable belief that it was necessary for him to shoot in his defense, he cannot avail himself of such a belief." "4. The defendant, in his testimony, mentioned, as obstacle to escape, the wagon-wheel, the body of Jones on the ground, and that he was holding his mule by the reins. Do these circumstances, or any other circumstances disclosed in evidence, considered with them, show sufficient reason why defendant did not get out of the way of threatened danger? When asked by the solicitor why he did not turn loose the mule and get out of the way, he replied that he was afraid his mule would get away. I need not charge you, gentlemen, that if it became a matter of choice between letting go the mule and destroying a human life, the law would declare that the mule should go and the life be saved." The court refused to give the following instructions at the defendant's request, and the defendant excepted to the refusal: "4. The jury are charged that if the evidence satisfies them of the good character of the defendant, this good character of the defendant may raise a reasonable doubt of the killing of the deceased being done with a criminal intent." "13. If the jury find from the evidence that the defendant,

with no intention of bringing on a difficulty, approached the deceased in a peaceable manner, and the deceased made the first hostile demonstration by drawing a knife, and that the defendant was in such proximity to the deceased as to render it hazardous to attempt flight, then the jury should acquit the defendant." "14. If the jury find from the evidence that the defendant, with no intention of bringing on a difficulty, approached or went near to deceased, in a peaceable manner, and that the deceased assaulted him with a deadly weapon or knife, calculated to produce death, and the assault was open and direct and in perilous proximity, then the law would not require the defendant to endanger his safety by attempted flight, and the jury must acquit the defendant." "15. If the jury believe from the evidence that the defendant, with no intention of bringing on a difficulty, approached or went near to the deceased, in a peaceable manner, and deceased made the first hostile demonstration by drawing a weapon, and if the defendant was in such proximity to deceased as to render it hazardous to attempt flight, or if the assault was with a deadly weapon, and was open and direct, and in perilous proximity, then the law would not require the defendant to endanger his safety by attempted flight, and the jury should acquit the defendant." "18. Proof of contradictory statements made by a witness as to material facts is sufficient to create or raise a reasonable doubt as to the evidence of such witness, and goes to his credibility."

William L. Martin, attorney general, for the State.

84 THORINGTON, J. Appellant was tried under an indictment charging him with murder. The plea was self-defense, and he was found guilty of murder in the second degree. The only questions reserved on the trial for consideration by this court are exceptions to portions of the general charge given by the court to the jury, and the refusal of the court to give several special charges requested by appellant.

The general charge, on demand of appellant, was given by the court in writing. We have examined it carefully as a whole, and find it to be a fair, clear, and correct statement of the law, and to cover fully every phase of the case made by the testimony. The first exception is to that portion of the charge which is in the following words: "One remark of counsel, in addressing you, gentlemen, might mislead you.

It was something to the effect that you are above this court^{ss} and the supreme court in your right to decide this case. The statement, gentlemen, is only partially correct. So far as determining what the facts are, what the evidence shows, it is true; for you are the sole judges of the facts, and in judging them you are above and beyond every other tribunal, personage, or agency; but, so far as determining what the law is which is to be applied to the facts, and by such application a true verdict to be reached, the statement of the counsel is not correct."

The bill of exceptions recites that "one of defendant's counsel stated to the jury that they, the jury, were above the court and the supreme court in their right to decide this case." This remark should not have been made by counsel without accompanying it with such an explanation as the court gave, and it clearly imposed upon the court the duty to see that the jury was not misled or improperly influenced by it. The mode adopted by the court of explaining and limiting it was proper, and the distinction drawn by the court between the province of the jury and that of the court is in accord with the law of this state and amply supported by authority: *Marcus v. State*, 89 Ala. 23; *Harrison v. State*, 78 Ala. 5.

The second exception is to that part of the charge in which the court, after laying down the law of self-defense, uses the following language: "In the system [of self-defense] so established, no balm or protection is provided for wounded pride or honor in declining combat or sense of shame in being denounced as cowardly. Such thoughts are trash as compared with the inestimable right to live." This is but the statement of a universally recognized doctrine of the criminal law, and has, in substance, frequently been declared in the decisions of this court: 3 Brickell's Digest, p. 219, secs. 570 et seq.

The portion of the charge to which appellant's third exception is directed asserts a correct principle of law, and is directly applicable to the testimony in the case. There was evidence tending to show that appellant had been drinking shortly before the killing occurred, and was under the influence of liquor at the time, but not sufficiently so as to incapacitate him for knowing what he was doing. In a preceding portion of the general charge the court had correctly instructed the jury as to the law of self-defense, and that portion of the charge to which this exception is addressed instructed the jury, in effect, that if the defendant, by voluntarily putting himself

under the influence of liquor, incapacitated himself for taking such a view of the situation ⁸⁶ as a reasonably prudent man would have taken under the circumstances, and in consequence thereof he acted upon an exaggerated or unjustifiable belief as to the necessity for taking the life of the deceased in defense of his own, such belief could not avail him as a defense to the charge in the indictment. This is unquestionably the enunciation of a sound principle of law. Justification for taking human life is not to be found in the excited or tortured imaginings of men whose passions are inflamed by what is generally recognized as itself often a potent incentive to crime. If such excuses could avail in the courts human life would be cheapened, crime encouraged, and the safeguards provided by law for security to life and property would be seriously impaired. Drunkenness on the part of the accused at the time of committing the homicide may have the effect of reducing the offense from murder to manslaughter if shown to have been so excessive as to render him incapable of forming the design to take life; but there is no principle of law which authorizes drunkenness to be invoked as an excuse for crime or as a ground for enlarging the right of self-defense: *King v. State*, 90 Ala. 612; *Cleveland v. State*, 86 Ala. 1; *Williams v. State*, 81 Ala. 1; 60 Am. Rep. 133; *Fonville v. State*, 91 Ala. 39.

The fourth exception to the general charge covers that part thereof which announces the law of retreat as applicable to the facts of the case. The intentional killing of the deceased by the defendant with a deadly weapon was shown by the uncontradicted testimony of the state, and the burden was thereupon cast on the defendant not only to show a pressing necessity, actual or reasonably apparent, to take the life of deceased in self-defense, but the *onus* was further on him to show that he could not have safely retreated without apparently increasing his peril. The inability to retreat safely being one of the elements of fact which enters into and creates the necessity to kill, the defendant must prove it unless it arises out of the evidence produced to prove the homicide; and the fact that retreat would not place him in less peril or on better vantage ground than before has been held in some cases not to excuse him from the performance of that duty. But this last principle is not to be extended beyond the particular cases in which it is applied and cases based on analogous facts: *Stitt v. State*, 91 Ala. 10; 24 Am. St. Rep. 853; *Davis v. State*, 92 Ala. 20; *Gibson v. State*, 89 Ala. 121; 18

Am. St. Rep. 96; *Carter v. State*, 82 Ala. 13; *Wills v. State*, 78 Ala. 362; *Ingram v. State*, 67 Ala. 67. The portion of the charge challenged by this exception is fully as favorable to the defendant as it should have been, and probably more so ⁸⁷ than it might have been under the proof and the law above declared as applicable to the facts of this case.

The special charge numbered four requested by the defendant instructs the jury that his good character, alone, if proved to the satisfaction of the jury, might raise a reasonable doubt that the killing was done by defendant with a criminal intent. This was tantamount to an instruction that the good character of the defendant would alone justify his acquittal, and is, therefore, clearly erroneous as a proposition of law. The correct doctrine is that proof of the good character of the accused is admissible in all criminal cases, not only where doubt exists on the other proof, but also to generate a doubt; but such proof must be considered by the jury in connection with all the other testimony and not independently thereof, and the guilt or innocence of the defendant determined from all the testimony: *Pate v. State*, 94 Ala. 14; *Johnson v. State*, 94 Ala. 35; *Williams v. State*, 52 Ala. 412.

Charge numbered thirteen, requested by the defendant and refused by the court, ignores entirely the inquiry whether deceased made any hostile demonstration towards defendant after drawing his knife, and assumes as a matter of law that the mere drawing of a knife by the deceased, in a hostile manner, created an impending, imperious necessity for the defendant slaying him in self-defense. It is not enough that the deceased had at hand the means for effecting a deadly purpose with respect to the defendant, but it must also appear by some act or demonstration of the former that he intended, at the time of the killing, to carry out his purpose, or the circumstances must be such as to create a reasonable belief in the mind of the slayer that it was necessary to deprive his assailant of his life to save his own, or his body from grievous harm: *Rogers v. State*, 62 Ala. 170; *Lewis v. State*, 51 Ala. 1. Taking the charge as a whole, the jury might have found every fact hypothesized in it without finding that there existed any necessity, actual or apparent, for defendant to take the life of the deceased at the time he fired the fatal shot. The charge is obviously copied from section 579 of 3 Brickell's Digest, page 221, but overlooks the qualifying reference therein to the next preceding section relating to the ele-

ment of impending peril, actual or apparent. It is also erroneous, because it assumes as matter of law that the mere hostile drawing of a knife by the deceased made it necessary for defendant to kill him in self-defense, instead of leaving that question to the jury.

Charge number fourteen assumes as matter of law that on ^{ss} the facts therein postulated the defendant could not have retreated without endangering his life. It was an inquiry for the jury to determine on all the proof whether the defendant could have retreated without endangering his safety, or increasing his peril, and not a matter to be decided by the the court. It may further be said of this charge that it assumes the defendant was assaulted by deceased with a deadly weapon, or a knife calculated to produce death, whereas the testimony, so far as the bill of exceptions discloses, fails to show that the knife was a deadly weapon, or to show any description whatever of the knife.

Charge number fifteen is the substantial embodiment of the two charges numbered, respectively, thirteen and fourteen, and is, therefore, subject to the infirmities above pointed out to each of these charges.

As a further objection to all three of the charges it may be added that they are each and all framed in entire disregard of the inquiry as to the degree of force it may have been necessary for defendant to employ in order to repel the threatened danger he claims to have been in at the time of slaying the deceased. Self-defense, it has been said, is simply the resistance of force or seriously threatened force, actually impending (or reasonably apparent) by force sufficient to repel the actual (or apparent) danger and no more. If it goes beyond this, there is guilt which is not excusable or justifiable: *Lewis v. State*, 51 Ala. 1; *Hughey v. State*, 47 Ala. 97. As pertinent to all three of the charges, it may be said that, in order to justify the homicide, the defendant must have been free from fault himself in provoking or bringing on the difficulty, and must not have entered into it willingly, and there must have existed at the time of the killing an imperious necessity to kill his alleged assailant, or such an appearance of such imperious, impending necessity as to impress the mind of a reasonably prudent man that such necessity did exist; and he should have used only such force as was necessary to repel the actual, or reasonably apparent, danger, and no more, and the circumstances and surroundings must have

been such that he could not have retreated or declined the combat without increasing the danger to which he was then in fact or apparently subjected.

After carefully weighing the testimony in this case, and allowing it the utmost probative force, we have no hesitancy in saying that it falls far short of meeting the conditions necessary to make out a case of self-defense according to the rules and authorities referred to herein.

On the contrary, taking into consideration the position of the deceased in the wagon, and defendant's position when he fired, whether on his mule, as the state's witnesses testify, or on the ground, as defendant himself states, and accepting the defendant's own testimony as to his means and opportunity for avoiding, without danger to himself, the necessity of slaying the deceased, we are unable to reach any other conclusion but that the question was simply narrowed down to the choice, on defendant's part, of murdering the deceased or turning loose a "wild and skittish mule," and that the defendant elected to take the life of Wilder and hold on to his mule. He must now abide by the consequences the law attaches to his rash and wicked act: *Squire v. State*, 87 Ala. 114.

All the exceptions, shown by the record, predicated on the law of self-defense might have been overruled, on his own testimony.

Charge numbered eighteen is abstract. The bill of exceptions fails to disclose any testimony to which it can be referred. It is also erroneous, because it invades the province of the jury. It is altogether with the jury what weight they will give to the testimony of a witness who is shown to have made contradictory statements.

We have carefully considered all the rulings of the court to which exceptions were reserved, as well as the entire record, and find no reversible error. The judgment and sentence of the circuit court are accordingly affirmed.

Affirmed.

HOMICIDE.—INTOXICATION OF ACCUSED at the time the killing took place is material only when it is so excessive as to preclude the existence of malice, and thereby reduce the degree of the homicide: *Keenan v. Commonwealth*, 44 Pa. St. 55; 84 Am. Dec. 414; *Cleveland v. State*, 86 Ala. 1; *Walker v. State*, 91 Ala. 76; *People v. Vincent*, 95 Cal. 425; *Fonville v. State*, 91 Ala. 39; *Commonwealth v. Cleary*, 148 Pa. St. 26; *Wilkerson v. Commonwealth*, 88 Ky. 29; *King v. State*, 90 Ala. 612. If it appears that the defendant, although intoxicated at the time of the homicide, was sober enough to form an intent,

and to deliberate and premeditate the crime, his responsibility is the same as if he had been perfectly sober: *People v. Fish*, 125 N. Y. 136.

HOMICIDE—SELF-DEFENSE—DUTY TO RETREAT.—BURDEN OF PROOF is on the defendant to show that he could not safely retreat: *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96; *Stitt v. State*, 91 Ala. 10; 24 Am. St. Rep. 853.

HOMICIDE.—EVIDENCE OF GOOD CHARACTER OF ACCUSED IS ALWAYS ADMISSIBLE: *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96; and if, in connection with the rest of the evidence, it is sufficient to raise a reasonable doubt as to his guilt, it is the duty of the jury to acquit him: *Commonwealth v. Cleary*, 135 Pa. St. 64; *Klehn v. Territory*, 1 Wash. 584. But on the issue of the defendant's reputation for peace, evidence of particular acts is incompetent: *Kearney v. State*, 68 Miss. 233.

HOMICIDE—HOSTILE DEMONSTRATIONS BY ACCUSED.—To justify homicide, on the ground of self-defense, it is not enough that the deceased had the means at hand of effecting a deadly purpose, unless the evidence shows some act or demonstration to carry it out: *Harrison v. State*, 24 Ala. 67; 60 Am. Dec. 450; *State v. Jackson*, 44 La. Ann. 160.

HOMICIDE.—SELF-DEFENSE, WHAT CONSTITUTES, A QUESTION FOR THE JURY: *North v. People*, 139 Ill. 81. It is not enough that the party assailed should believe, but the circumstances must be such that a jury can say that he had reasonable grounds to believe, himself to be in danger: *State v. Thompson*, 9 Iowa, 188; 74 Am. Dec. 342; *Wesley v. State*, 37 Miss. 327; 75 Am. Dec. 62.

WITNESSES, CREDIBILITY OF, A QUESTION FOR THE JURY: *Baker v. Young*, 44 Ill. 42; 92 Am. Dec. 149; *White v. Fox*, 1 Bibb, 369; 4 Am. Dec. 643; *Flemming v. Marine Ins. Co.*, 4 Whart. 59; 33 Am. Dec. 33; *Taylor v. Kelly*, 31 Ala. 59; 68 Am. Dec. 150; and note to *Sharp v. State*, 14 Am. St. Rep. 44-46.

BEGGS v. EDISON ELECTRIC ILLUMINATING Co.

[96 ALABAMA, 295.]

ACCOUNTS, JURISDICTION OF EQUITY.—Where the accounts to be examined and stated are on one side only, a court of equity will not assume jurisdiction of a bill for an accounting, unless the accounts are so complicated as to require the aid of equity to adjust them, or a discovery is prayed for and facts are alleged which show the necessity for such discovery.

MANUFACTURING CORPORATIONS, ELECTRIC COMPANIES DEEMED TO BE.—A corporation engaged in generating, storing, transmitting, and selling electricity is a manufacturing corporation within the purview of the section of the Alabama code (1565) which authorizes the consolidation of corporations of that character.

BILL in equity for an accounting. The complainant corporation had consolidated with the Merchants' Electric Light and Power Company, of which the defendant had been the treasurer and general manager before the consolidation took place. The defendant's grounds of demurrer, referred to in the opinion of the court, were as follows: "1. Said bill of

complaint shows on its face that the complainant has no right to maintain this suit; 2. Said bill fails to show that the original Edison Electric Illuminating Company, a body corporate, and the Merchants' Electric Light and Power Company, a body corporate, were ever lawfully consolidated; 3. Said bill, in stating that the statutes in reference to the consolidation of said companies have been in all things strictly complied with, is not a statement of facts, but merely a conclusion of the pleaders; 4. Said bill fails to present such case of entanglement or complication in the account kept by defendant as would give the court jurisdiction; 5. Said bill fails to show any mutuality in the account sought to be taken; 6. Said bill shows on its face that if the complainant is entitled to the three thousand dollars alleged to have been appropriated by defendant, its remedy for recovery thereof is at law, and not in equity; 7. Said bill fails to allege facts showing that any discovery is needed in this cause; 8. Said bill fails to allege, in clear and distinct terms, any reason for the interposition of a court of equity to establish any claim complainant may have against the defendant; 9. The bill shows on its face that complainant has a clear and adequate remedy at law; 10. It is not alleged in said bill that the answer of the defendant is essential for complainant to ascertain the true account between plaintiff and defendant, and that the defendant is capable of making the discovery needed." The defendant appealed from the decree overruling the demurrer.

Lane and White, for the appellant.

James H. Little, for the respondent.

²⁹⁷ **STONE, C. J.** Courts of equity have, for a long time, exercised a general jurisdiction in cases of mutual accounts founded in privity, upon the ground of the inadequacy of the remedy afforded by the common law. And this equitable interposition has been extended until equity will now entertain suits for accounts in matters which were formerly only cognizable at law. The ancient common-law action of account being so imperfect in its processes, and so inadequate in its remedies, jurisdiction in such matters was originally given to equity, for the reason that the common-law courts could not give any remedy at all, or the remedy was not as complete as that furnished by the chancery court. As courts of equity now entertain concurrent jurisdiction with the courts of law, in matters of accounts, a decision as to the proper

tribunal must be governed by considerations of convenience and adequacy; and this is determined by the facts pertaining to each individual cause of action, and the relief sought: 1 Story's Equity Jurisprudence, sec. 457.

As said above, where the accounts are mutual, and founded in privity, the jurisdiction of equity is undoubted. But where the accounts to be examined and stated are on one side only, the allegations of the bill must show the existence of certain conditions which are prerequisite to the exercise of equitable jurisdiction. There must either be so great a complication in the matters of account that a common-law court is unable to ferret them out, or there must be the ²⁹⁸ allegations of such facts as show the necessity for a discovery, and this discovery must be prayed for. The reason for this rule is evident. For, in going into courts of equity, one is met at the threshold with the inquiry, can complete and adequate remedy be obtained in a court of law? If this question be answered in the affirmative, the litigant must retrace his steps, unless the allegations of his bill show that the matters involved come within the exclusive jurisdiction of equity. •

The object of the present bill, as gathered from its allegations and the prayer, is the stating of an account between the complainant corporation and the defendant, and the obtaining of a decree against the defendant for three thousand dollars, which is alleged to have been obtained by the defendant through fraud. There are general allegations in the bill of complication in the accounts between the defendant and the Merchants' Electric Light and Power Company, with which company complainant consolidated before the filing of the present bill. But there is no such particularity in these allegations as show in what way, and in reference to what matters, the accounts between the defendant and the company are complicated. There is no prayer for a discovery, nor does the frame of the bill disclose that a discovery is necessary.

It is now the settled doctrine of equity jurisprudence, that when the accounts to be examined are on one side only, great complication ought to exist in the accounts, or a discovery should be required, in order to induce a court of chancery to exercise jurisdiction. As is said by Mr. Story, "In such a case, if no discovery is asked or required by the frame of the bill, the jurisdiction will not be maintainable. . . . For in such case there is not only a complete remedy

at law, but there is nothing requiring the peculiar aid of equity to ascertain or adjust the claim: 1 Story's Equity Jurisprudence, sec. 458. In *Fowle v. Lawrason*, 5 Pet. 495, Chief Justice Marshall, in delivering the opinion of the court, said: "In all cases in which the action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted. It is the proper tribunal. And in transactions not of this peculiar character, great complication ought to exist in the accounts, and some difficulty should be interposed, or some discovery should be required, in order to induce a court of chancery to exercise jurisdiction." It was said in *Knotts v. Tarver*, 8 Ala. 743, a leading case on this subject, "that it is not sufficient to give a court of equity jurisdiction that an account ²⁹⁹ exists between the parties, or that fraud has been practiced; but there must be a discovery wanted in aid of the account, or to disclose the fraud, or the accounts must be so complicated as to require the aid of a court of chancery to adjust them; otherwise, there is a complete remedy at law." In cases where a discovery is not prayed for, the complication must be so alleged in the bill as to show on its face the inadequacy of a remedy at law. The rule stated by Lord Cottenham is: "Where the case is so complicated, or where there are other circumstances where a remedy at law will not give adequate relief, then a court of equity assumes jurisdiction": *Foley v. Hill*, 2 H. L. Cas. 28. These complications must be substantial and material. The fact that the bill happens to contain a general, vague charge that there are voluminous and intricate accounts between the parties, and this general allegation is inserted merely as a predicate for the purpose of bringing the case within the jurisdiction of a court of equity, the court will not entertain the bill, if demurred to for want of equity. This rule was clearly laid down by Lord Langsdale in *Darthez v. Clemens*, 6 Beav. 165, and has been followed ever since: *Kirkman v. Vanlier*, 7 Ala. 217; *Knotts v. Tarver*, 8 Ala. 744; *Dickinson v. Lewis*, 34 Ala. 638; *State v. Bradshaw*, 60 Ala. 239; *County of Dallas v. Timberlake*, 54 Ala. 403; *Lott v. Mobile Co.*, 79 Ala. 69.

Under the principles above announced, the chancellor should have sustained the first, fourth, fifth, sixth, seventh, eighth, ninth, and tenth grounds of demurrer.

The other question sought to be raised by the demurrer was, whether the Edison Electric Illuminating Company and

the Merchants' Electric Light and Power Company were such corporations as were authorized to be consolidated under the statute. Section 1565 of the code of 1886 declares that "any two or more mining, quarrying, or manufacturing corporations may unite or consolidate their capital stock, property, and business, in the manner hereinafter provided." The direct question involved is, whether electric-light companies are manufacturing corporations, and as such are authorized by the statute to consolidate. In view of the rapid development of electricity as a motive power, and considering the many phases in which questions pertaining to this power arise, we do not deem it amiss to decide the question now presented.

The word "manufacture" means the making of any thing by hand or artifice: *Louisville etc. R. R. Co. v. Fulgham*, 91 Ala. 555. Mr. Worcester's Dictionary defines manufacture as "the process ²⁰⁰ of making anything by art, or of reducing materials into a form fit for use by the hand or by machinery." The definition that the word is given by the Century Dictionary is as follows: "The production of articles for use from raw or prepared materials, by giving these materials new forms, qualities, properties, or combinations, whether by hand labor or by machinery." According to the above definitions of the word "manufacture" we are constrained to consider and declare an electric-light company a manufacturing corporation to all intents and purposes. It is no answer to this argument to say, that electricity exists in a state in nature, and that a corporation engaged in the electric-light business collects or gathers such electricity. This does not fully or exactly express the process by which such corporations are able to make, sell, and deliver something useful and valuable. The electricity that exists in nature is of a very different quality from that produced by means of machinery. The business in which an electric-light company is engaged makes it necessary to invest large capital in the plant. Then there is purchased and consumed coal and other materials to produce steam in order to furnish the power for the operation of the machinery. Then there is supplied and operated a complicated system of machinery, like that commonly used in manufacturing establishments, such as boilers, engines, dynamos, shaftings, beltings, etc.; and then, by means of wires, cables, and lamps, the mysterious power generated by the machinery used from the materials furnished is transmitted,

and lights the streets and private houses. But the electric currents that produce these results cannot be said to be "the free gift of nature, gathered from the air or the clouds." It is the produce of capital and labor, and in this respect cannot be distinguished from ordinary manufacturing operations. The collection, storage, preparation for market, and the transportation of ice as found in nature, is not manufacturing; but the production of ice by artificial means is: *People v. Knickerbocker Ice Co.*, 99 N. Y. 181. As well say that a gas company, organized under the corporation laws, is not a manufacturing corporation, because both gas and the electricity generated are the result of artifice. Their purpose is the same, and their transmission is in a similar manner—the one by pipes, and the other by wires. It has been expressly decided that a gas company is a manufacturing corporation: *Nassau G. L. Co. v. Brooklyn*, 89 N. Y. 409.

When it is attempted to establish the proposition, that the gas which lights one room is a manufactured product, and the electricity which lights another is not, one is obliged ²⁰¹ to rely more on the definition of terms, and the distinctions of scientists, than the actual, practical processes and productions by means of which results in all respects, or at least substantially, the same are produced. When we take into consideration that the electricity now used and supplied in the ordinary business of life is essentially the product of skill and labor, we can find no difficulty in reaching the conclusion that a corporation engaged in generating, storing, transmitting, and selling such electricity is a manufacturing corporation. In reaching this conclusion we are not without precedent. The very point we have in hand was ably considered in the case of the *People v. Wemple*, 129 N. Y. 543. In that case the court of appeals of New York were unanimous in the opinion that the electric light company was a manufacturing corporation.

The city court judge did not err in overruling the second and third grounds of demurrer.

Reversed and remanded.

ACCOUNTS, EQUITY WILL ASSUME JURISDICTION OF, WHEN.—The fact that an equitable claim or trust is involved is sufficient to give a court of equity jurisdiction of a suit for an accounting: *Penn v. Ingles*, 82 Va. 65; *Paul v. Land*, 15 Or. 442; *Petrie v. Torrent*, 88 Mich. 43. The same result follows, where the bill seeks a discovery, and the discovery is made by the answers, although the case is otherwise a proper one for a court of law:

Sanborn v. Kittredge, 20 Vt. 632; 50 Am. Dec. 58. But jurisdiction will not be assumed of a case in which there are neither any mutual accounts to be adjusted, nor any discovery wanted in aid of the plaintiff's account, nor any equitable claims or trusts involved, nor any special intricacy in the accounts. *Upton v. Paxton*, 72 Iowa, 295.

BOYD v. JONES.

[96 ALABAMA, 305.]

DEBTOR AND CREDITOR—APPLICATION OF PAYMENTS BETWEEN MORTGAGOR AND MORTGAGEE.—A mortgagee, in the absence of an agreement with the mortgagor, is bound to apply moneys realized from the sales of property covered by the mortgage to the mortgage debt. The burden of proving that the mortgagor consented that such moneys should be applied to any other debt rests upon the mortgagee.

TRIAL—CHARGE COVERING ONLY PART OF THE EVIDENCE, WHEN ERRONEOUS.—A charge which ignores any material, conflicting, or qualifying evidence, or a material fact which is the legitimate inference of other proven facts, is misleading and erroneous.

MORTGAGES—STIPULATION FOR ATTORNEYS' FEES IF SUIT IS BROUGHT, EFFECT OF.—The mere bringing of a suit on a mortgage contract does not, without further proof, authorize the recovery of attorneys' fees which the mortgagor has stipulated to pay in the event of the claims being placed in the hands of an attorney for collection. Such fees cannot be recovered if the debt is paid before suit is brought.

ACTION brought to recover twenty-five hundred dollars "due by bond executed by the defendants on the twenty-seventh day of May, 1889, with interest thereon," and "reasonable attorneys' fees, as per contract executed with and as part of the contract and note" upon which the suit is founded; allowance being made in the complaint for two credits amounting to twelve hundred and nineteen dollars. The contemporaneous agreement referred to in the opinion contained the following provision: "We further agree that should this obligation not be performed by us, and should the same A. Boyd & Co., upon such default, place the same and the note hereinabove mentioned, one or both, in the hands of an attorney for collection, we will pay the reasonable charges of such attorney for such services." The plaintiffs excepted to the following portion of the general charge of the court: "I charge you that under the terms of the written contract in evidence the plaintiffs were bound, and it was their duty, to apply the proceeds of the cotton shipped to them by defendants, in the first instance, to the payment and discharge of the storage and two and a half per cent commissions, and so

much of the remainder of the proceeds from said proceeds of the sale of cotton as would pay said note and interest thereon to the bond or note sued on in this case. And if the jury believe from the evidence that defendants had shipped enough cotton to plaintiffs, which, when sold, amounted to enough to pay said storage and commissions, and also the note and interest thereon, then it was their duty to apply the proceeds arising from sale of said cotton to the payment of said storage and commissions and note sued on and interest, unless said contract had been changed or altered; and the burden was upon plaintiffs to show such change or alteration." The following charges were also given at the request of the defendants, and excepted to by the plaintiffs: "6. I charge you, gentlemen of the jury, that the written contract in evidence between the parties to this cause provides that the cotton was to be placed as a credit upon the note, and unless A. Boyd & Co. have shown by a preponderance of evidence that said written contract was afterwards changed by agreement between the parties, then you will find for defendants, Jones and Pope, if you find enough cotton was delivered to pay the debt." "7. If the jury find from the evidence that Jones and Pope, and A. Boyd & Co. entered into a written agreement to the effect that Jones and Pope were to ship cotton to A. Boyd & Co., and that said cotton was to be credited on the note, and that Jones and Pope did ship, in pursuance of said agreement, cotton to the amount of thirty-four hundred dollars to said A. Boyd & Co., then it is your duty to find that said note sued on is paid, unless you find further from the evidence that Jones and Pope agreed for the credits for the cotton to be placed upon the account instead of the note." "8. If the jury find from the evidence that Jones and Pope mailed a letter in October, 1888, to A. Boyd & Co., directing them to place the cotton as a credit upon the note until paid, and that A. Boyd & Co. received said letter, then, if you find that a sufficient quantity of cotton was shipped to pay said note, and received by said A. Boyd & Co., you will find for the defendants, Jones and Pope." Exception was also taken by the plaintiffs to the refusal of the court to instruct the jury as follows: "When the evidence leaves a disputed question of fact in a state of doubt and uncertainty, the fact cannot be regarded as established, and the issue must be found against the party on whom the burden or *onus* of proof rests. And the *onus* of proof in this

case as to the question of the application of payments is on the defendants." The defendants had judgment, and the plaintiffs appealed.

McGuire and Collier, Nesmith and Sanford, for the appellants.

Watts and Son, for the respondents.

²⁰⁷ COLEMAN, J. The action was instituted by appellants to recover a balance due upon the written obligation of the defendants for the payment of twenty-five hundred dollars, and also for the recovery of reasonable attorneys' fees, stipulated for in contemporaneous agreement, made to secure the payment of the note or obligation. By the terms of the agreement, the defendants contracted to ship two hundred and fifty bales of cotton to plaintiffs at Memphis, Tennessee, to be stored and sold on their account, and the proceeds to be applied in payment of "the storage which may be due on said cotton, and two and one-half per cent on the amount of such sales for commission for selling said cotton, and then to apply the proceeds of so much of said cotton as may be delivered by us to the amount hereinabove specified," etc. The amount above specified was that contained in the note, and to recover which the present suit was instituted. It was further stipulated that, upon failure to ship two hundred and fifty bales of cotton, the defendants were to pay as "stipulated damages," one dollar and twenty-five cents per bale. The payment of the note was further secured by the transfer of collaterals. The evidence shows that only seventy-two bales were shipped to plaintiffs under this agreement. It further shows that the defendants became largely indebted to plaintiffs for shipment of goods, payment of drafts drawn by defendants, and remittances of money, in excess of the twenty-five hundred dollars evidenced by the note. The defendants were charged for the deficiency in the shipment of the cotton at one dollar and twenty-five cents per ²⁰⁸ bale, as stipulated by the parties. The plaintiffs sold the cotton received, and applied the proceeds, first, to the payment of the open unsecured account, and the balance, after paying the unsecured indebtedness, was credited upon the note. The main question of contention was, whether the plaintiffs had the right to make such application of payments, and the errors assigned are upon the correctness of the charges given by the court to the jury, upon the facts in evidence bearing upon this question.

The law is, "a mortgagee, in the absence of an agreement with the mortgagor, is bound to apply moneys realized from the sales of property covered by the mortgage to the mortgage debt; but, as between the mortgagor and mortgagee, such moneys may, by the consent of the mortgagor, be applied to the payment of an unsecured debt." The consent of the mortgagor in such case becomes a material question: *Taylor v. Cockrell*, 80 Ala. 236; *Strickland v. Hardie*, 82 Ala. 414; *Mahan v. Smitherman*, 71 Ala. 563; *Darden v. Gerson*, 91 Ala. 324; *Levystein v. Whitman*, 59 Ala. 345. The burden rests upon the mortgagee to show that the mortgagor has consented that the proceeds of the payment covered by the mortgage might be applied in payment of any other debt than that secured by the mortgage. A mortgagor, if he sees proper, may consent to adopt or ratify an unauthorized application of payment made by his mortgagee creditor of the proceeds of mortgaged property to an unsecured debt. Whether the mortgagor has consented to either is a question of fact to be determined by the jury, and the burden is upon the mortgagee, in either case, to reasonably satisfy the jury of such consent or ratification.

We think the oral charge given by the court to which exception was taken is strictly in accord with these well-established principles. As the uncontradicted evidence shows that the proceeds of the cotton amounted to more than sufficient to pay the storage and two and one-half per cent commissions and the note, we might consider the giving of the two charges, Nos. 6 and 7, at the request of the defendants, as error without injury; but, as the case must be reversed upon other grounds, we call attention to the fact that the contract does not provide, as asserted in the charges, for the application of the proceeds of the cotton, in the first instance, to the payment of the note, but only after the payment of storage and commissions.

Charge numbered eight (8), given at the request of the defendants, is clearly erroneous. Under this charge, the jury were required to find for the defendants, if defendants at any ~~see~~ time in October, 1889, wrote a letter to plaintiffs directing them to place the proceeds of the cotton on the note, although the jury may have been reasonably satisfied from other evidence in the case, that prior or subsequent to that time the defendants did consent that the proceeds of cotton might be applied to the unsecured debt.

We cannot say there is no evidence in the record from which the jury would be authorized to draw such a conclusion. There were other letters written during the same month by defendants to plaintiffs advising them of the shipments of cotton, and in the same letter advising plaintiffs that defendants were drawing on them for certain sums or money, and asking for remittances in cash. There is other evidence tending to show that plaintiffs rendered statements of accounts to defendants, in which the proceeds of the cotton had been credited to the open account, and that defendants said the statements and credits as thereon entered were correct, and payments properly made. Charge No. 8 ignores all the evidence offered by plaintiffs to show the consent of the defendants to the payments as applied by plaintiffs. A charge which ignores any material conflicting or qualifying evidence, or a material fact which is the legitimate inference of other proven facts, is necessarily misleading and erroneously faulty: *Ramsey v. State*, 91 Ala. 29; *Thomas v. State*, 91 Ala. 59; *White v. Craft*, 91 Ala. 142; *Fariss v. State*, 85 Ala. 1; *Thompson v. Duncan*, 76 Ala. 334.

There was no error in refusing the charge requested by plaintiffs. It placed the burden upon the defendants to show that the payments as applied were not properly applied. If the proceeds of the mortgaged property were applied to unsecured debts, the burden was upon the mortgagee to show consent or ratification by the mortgagor.

The provision in regard to the payment of the counsel fees, and also for the payment of reasonable storage of cotton, is not an unreasonable or illegal stipulation: *Harmon v. Lehman*, 85 Ala. 379. The mere bringing of the suit does not, without other proof, authorize a recovery of reasonable counsel fees. If plaintiffs' debt was paid before the bringing of the suit there can be no recovery for attorneys' fees, under the stipulations in the mortgage contract.

For the error in giving charge No. 8 the case must be reversed and the cause remanded.

Reversed and remanded. —

DEBTOR AND CREDITOR.—APPLICATION OF PAYMENTS: See, generally, notes to *Brady v. Hill*, 13 Am. Dec. 505, 506; *Harker v. Conrad*, 14 Am. Dec. 695; *Pickering v. Day*, 95 Am. Dec. 313. A creditor holding secured and unsecured notes may apply a payment to one of the unsecured notes: *Wood v. Callaghan*, 61 Mich. 402; 1 Am. St. Rep. 597; the general rule being that a creditor receiving payments from his debtor, without any direction as to their

application, may appropriate them to any legal debt which he holds against the debtor: *Blake v. Sawyer*, 83 Me. 129; 23 Am. St. Rep. 762; *Henry Bill Publishing Co. v. Utley*, 155 Mass. 366. A mortgagor may require the proceeds of the sale of the mortgaged property to be applied to the mortgage debt: *Sumner v. Kelly*, 38 S. C. 507; but he is not obliged to do so, and if he assents to another application his creditors cannot complain: *Sanborn v. Magee*, 79 Iowa, 501.

HUGHES v. TORGERSON.

[96 ALABAMA, 346.]

MECHANICS' LIENS.—THE DESCRIPTION OF A BUILDING in the notice of a mechanic's lien is sufficient if it enables a person familiar with the locality to identify the building as the only one corresponding with such description.

MECHANIC'S LIEN—NOTICE OF LIEN—ERROR IN THE NAME OF THE OWNER. The description of a building in the notice of a mechanic's lien is not rendered insufficient by the fact that the building is stated to be the property of a person who was no longer alive when the notice was filed.

MECHANICS' LIENS—ARCHITECTS, WHEN WITHIN THE PROTECTION OF THE STATUTE.—An architect who prepares the drawings, plans, and specifications for a building, and superintends the erection thereof, is within the protection of a statute which creates a lien in favor of "every mechanic, or other person who shall do or perform any work or labor upon . . . any building, or improvement on land."

MECHANICS' LIENS—SUITS TO ENFORCE—NECESSARY PARTIES DEFENDANT. Judgment for the plaintiff in a suit to enforce a mechanic's lien must be reversed for want of the necessary parties defendant, if the only defendant in the suit was the administrator of a deceased owner of the property subject to the lien.

ACTION against J. W. Hughes, administrator of the estate of B. M. Hughes, to enforce a mechanic's lien. Exception was taken by the defendant to the refusal of the court to give the following instructions: 1. "That an architect who furnishes the drawings and plans for a building, and superintends its erection, has no lien upon the building so erected, for his services." 2. "That when Brice M. Hughes died, the title to the property in question descended to his heirs at law, and that it was not sufficient to file a lien against Brice M. Hughes, but the lien ought to have been filed against the heirs at law of Brice M. Hughes, as his heirs at law were the owners of the property when the statement was filed, intended to perfect the lien." 3. "That, in this case the heirs at law of Brice M. Hughes ought to have been made parties in this suit, and, in the absence of the heirs at law, no lien can be enforced on the property described in the complaint, and in the statement offered as evidence."

Ward and John, for the appellant.

347 WALKER, J. A lien is claimed under section 3018 of the code upon a building and upon a lot of land on which it is erected. By the judgment a lien was declared only on the building, and not on the lot. This could be done under the statute: *Bedsole v. Peters*, 79 Ala. 133. In the statement filed by the plaintiff in the office of the judge of probate, a lien was claimed upon the building only, and not upon the lot. Of course, the lien declared could not extend beyond the claim as asserted in the statement.

The first question to be considered is, whether the building was sufficiently described. The description is: "A certain three-story brick building situated on rear part of lots 2 and 3, block 122, 20th street, between avenue A and B in the city of Birmingham." This description points out with reasonable certainty a three-story brick building occupying the hindmost part of two designated lots on a certain named **348** city block—the part thereof furthest from the street front of the two lots. This description, if followed by a person familiar with the locality, would lead him to the two lots named; and if he found the rear part thereof occupied by a three-story brick building, he could identify that building as the only one corresponding with the description. This is sufficient certainty: *Bedsole v. Peters*, 79 Ala. 133; *Kezartee v. Marks*, 15 Or. 529; Phillips on Mechanics' Liens, 2d ed., sec. 378. The statement avers that "the building is the property of one Dr. B. M. Hughes," who was deceased when the claim was filed. This did not render the description insufficient. The statute expressly provides that "no error . . . in the name of the owner or proprietor shall affect the lien": Code, sec. 3022.

The plaintiff claims a lien for the amount of the compensation due him for work and labor as an architect in the preparation of drawings, plans, and specifications for the building, and in superintending the erection thereof. Are such services by an architect "work and labor upon . . . a building or improvement on land," within the meaning of the statute? Code, sec. 3018. It is plain that a contractor for the construction of the building is within the protection of the statute. If he was also intrusted with the planning of the building and with the sole supervision of its erection, we think it is equally plain that his services in these particulars could be regarded

as properly a part of his work "upon the building," and that compensation therefor might be included in the amount for the security of which he could acquire a lien under the statute. There is nothing in the circumstance that such services were rendered by another person to put them beyond the protection of the statute. Under a New York statute a lien was authorized in favor "of any person who shall perform any labor or furnish any materials in building, altering, or repairing any house," etc., "by virtue of any contract with the owner," etc. "This language," it was said in *Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 262, "is general and comprehensive, and its natural and plain import includes all persons who perform labor in the construction or reparation of a building, irrespective of the grade of their employment or the particular kind of service. The architect who superintends the construction of a building performs labor as truly as the carpenter who frames it, or the mason who lays the walls, and labor of a most important character. . . . The language quoted makes no distinction between skilled and unskilled labor, or between mere manual labor and the labor of one who supervises, ³⁴⁹ directs, and applies the labor of others. . . . The general principle upon which the lien laws proceed is, that any person who has contributed by his labor, or by furnishing materials, to a structure erected by an owner upon his premises, shall have a claim upon the property for his compensation." The claim of an architect was allowed in that case. What was there said seems eminently sound, and is equally applicable to the Alabama statute. An architect who prepares the drawings, plans, and specifications for a building, and superintends the erection thereof, may as truly be said to perform labor thereon, as any one who takes part in the work of construction. That he is within the protection of the statute is a proposition well supported by adjudications upon other similar statutes: Phillips on Mechanics' Liens, 2d ed., sec. 158.

Dr. Hughes, who was the owner of the building in question, and under a contract with whom, as claimed by the plaintiff, the services were rendered, died intestate, before the suit was instituted. The only defendant was the administrator of his estate. On the death of the intestate his heirs became the owners of the property. A lien cannot be declared and enforced in a proceeding to which the owner of the property on which the lien is claimed is not a party: *Roman v. Thorn*, 83

Ala. 443. If the suit had been brought against the intestate in his lifetime it could have been revived and prosecuted against his personal representative alone, without making his heirs parties. The statute expressly provides for that contingency: Code, sec. 3031. This provision does not apply to suits brought after the death of the owner or proprietor of the property. In such case the general rule applies, that he who is, at the time the suit is commenced, the owner of the building or structure upon which the lien is sought to be enforced is a necessary party defendant, without whose presence the lien cannot be declared or enforced: 15 Am. & Eng. Ency. of Law, 165; Phillips on Mechanics' Liens, sec. 393. The personal representative of the deceased owner may also be made a party defendant. The prohibition against bringing suits against personal representatives within six months after the grant of letters does not apply to suits for the enforcement of such liens: Code, sec. 3043. Because of the absence of necessary parties defendant the judgment must be reversed.

Reversed and remanded.

MECHANIC'S LIEN.—THE DESCRIPTION IN THE NOTICE of a mechanic's lien is sufficient if it points out the building with reasonable certainty: *Kennedy v. House*, 41 Pa. St. 39; 80 Am. Dec. 594. If the building and land are once sufficiently described, the addition of a circumstance false or mistaken will not vitiate the description: *Northwestern Cement etc. Co. v. Norwegian-Danish etc. Seminary*, 43 Minn. 449; *Willamette Steam Mills Co. v. Kremer*, 94 Cal. 206; *McNamee v. Rauck*, 128 Ind. 59. The sufficiency of the description is a question for the jury: *Cleverly v. Moseley*, 148 Mass. 280; *Willamette Steam Mills Co. v. Kremer*, 94 Cal. 206. A description of the premises as lots 5 and 6 in block 18, in "North Minneapolis Addition to Minneapolis" sufficiently identifies lots 5 and 6, in block 18, in "North Minneapolis," there being no addition to, or division within, the city, except the latter, to which the description could be applied: *Russell v. Hayden*, 40 Minn. 88. But a general statement that the labor or material is for a line of street railway owned by the defendant in a city named is not sufficient, where it appears that the defendant has several lines of railway to any of which the description is equally applicable: *Nieming v. St. Paul etc. Ry. Co.*, 47 Minn. 124.

FORT PAYNE FURNACE COMPANY v. FORT PAYNE
COAL AND IRON COMPANY.

[96 ALABAMA, 472.]

CREDITOR'S SUIT—ALLEGATIONS OF FRAUD.—A mere general averment of fraud is not sufficient in a bill by which a creditor seeks to restrain a threatened disposition of a debtor's property. The conduct and facts from which the conclusion of fraud is deduced must be set out with such particularity that issue may be joined on the allegations.

RECEIVER, APPOINTMENT OF, WHEN PROPER.—The appointment of a receiver is, as a general rule, discretionary. The discretion is not arbitrary or absolute; it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of promoting the ends of justice and of protecting the rights of all the parties interested in the controversy and subject matter, and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding.

RECEIVER, CIRCUMSTANCES NOT WARRANTING APPOINTMENT OF.—A creditor's bill which merely avers that the directors of the defendant corporation, acting in pursuance of a vote of the stockholders, had ordered the issue of bonds, secured by a trust deed on all its property, that a portion of those bonds had been issued and disposed of, that the directors afterwards voted to sell the corporate property at a public sale, that the directors then issued a circular letter appealing to the stockholders to purchase the bonds as the only means of saving the property from sale and obviating an entire sacrifice of all the corporate effects in the payment of the bonds already disposed of, does not present a case for the appointment of a receiver, there being no allegations that any of the directors had an interest in the bonds or in the sale thereof, or that those bonds were not sold for their value and to *bona fide* purchasers, nor any facts stated which show that the proposed sale was not in strict compliance with the requirements of the trust deed.

CREDITOR'S BILL for the appointment of a receiver.

W. H. Denson and T. C. Carey, for the appellant.

Spaulding and Parks, Davis and Haralson, and Trus Page Pierce, for the respondent.

473 **STONE, C. J.** Each of the principal parties to this suit is a private corporation, having its business *situs*—its domicile—at Fort Payne. The furnace company owned and operated a blast furnace employed in converting iron ore into iron. The coal and iron company supplied coke and iron ore to the furnace company. The present suit was instituted by original bill in the name of the coal and iron company against the furnace company; and being in form a creditor's bill, Powell, on his petition, was allowed to come in as a co-complainant.

The bill avers that the furnace company was and is indebted to the coal and iron company in a sum exceeding thirty thou-

said dollars. This claim is not in judgment. The petition and averments of Powell represent that the furnace company did and does owe him over three thousand dollars, which is in judgment. An amendment to the bill contains the charge that the furnace company was insolvent. The bill was sworn to April 30, 1892, and was probably filed at that time. The bill then avers that "on or about the first day of May, 1891, the defendant [furnace company] by order of its directors, which order was based upon the vote of the stockholders of respondent, directing the action of the directors, voted to issue its bonds, not to exceed the amount of one hundred thousand dollars, and executed by its proper officers a deed of conveyance to the Old Colony Trust Company, a body corporate under the laws of Massachusetts, on the twenty-fifth day of May, 1891, conveying all its property, both real and personal. Said deed or conveyance was in trust for the benefit of the holders of the bonds, which were issued as above mentioned and set out. Complainant further ⁴⁷⁴ avers that respondent has issued and sold in pursuance of its said order the amount of about thirty-four thousand dollars worth of bonds."

The bill then avers that at a stockholders' meeting held at Providence, Rhode Island, on February 17, 1892, "it was voted to empower directors to sell respondent's property if it seemed to them best. That at a directors' meeting held in Providence, Rhode Island, March 24, 1892, it was voted to sell said property at public sale in Fort Payne, Alabama, on the ninth day of May, 1892." Appended to the bill is a circular letter issued by the directors, appealing to the stockholders to purchase the bonds as the only means of saving the property from sale and from an entire sacrifice of all the corporation's effects in the payment of the thirty-four or thirty-five thousand dollars of bonds previously disposed of. The property was advertised for public sale to the highest bidder, the sale to take place at Fort Payne, May 9, 1892.

The purpose of the present bill was to have the property placed in the hands of a receiver, and thus to prevent the sale. The register appointed a receiver, and on appeal to the chancellor he confirmed the appointment. There was also a motion to dismiss the bill for want of equity, which the chancellor overruled. From those two rulings of the chancellor the present appeal is prosecuted.

We have stated substantially all the material averments of fact contained in the bill which bear on the questions before

us. It is nowhere shown who were the purchasers, or who are the owners of the thirty-four or thirty-five thousand dollars of bonds issued in 1891, or whether the governing body of the corporation, or any member of it, has any interest in or claim to these bonds; and there is no semblance of charge that the directors, or any of them, have any interest in the sale proposed to be made. No charge is made of bad faith or fraud in the sale of the bonds, or that they were not sold for their value and to *bona fide* purchasers. Nor is it shown when the bonds became due, nor on what event or default the mortgage or trust deed is to become due and a foreclosure had according to the terms of the conveyance. No copy of the mortgage or trust deed is found in the record, and there is no attempt to set forth its terms or contents. For aught we know, the proposed sale was in literal compliance with the requirements of the mortgage.

We said we have stated substantially the averments of fact found in the bill. The bill, however, does contain the following averments: "Complainant charges that the proposed ⁴⁷⁵ sale on May 9, 1892, is a fraudulent scheme concocted for the purpose of selling said property so that there can be no redemption, and thereby secure to the bondholders the entire property in exclusion of all other creditors or stockholders. Complainant charges and avers, that, as will be shown by reference to exhibit A, unless checked in their fraudulent and unwise course, all the property of respondent, to the amount of fully one hundred thousand dollars' worth, will be sold by said directors for the small sum of thirty-four thousand dollars to the holders of respondent's bonds, and the complainant, and all other creditors, and the stockholders in respondent's corporation, will entirely lose their debts and stock. And complainant avers that said directors of respondent corporation are fraudulently conniving with the bondholders of respondent to sell all the property of respondent for simply the amount of the bonded indebtedness to the holders of the bonds, and that they have advertised and proposed at said sale to take in payment for the property of said respondent the bonds outstanding of respondent—and no effort has been made, or is being made, to pay its general indebtedness; and it is their purpose to sell it for no more than the amount of the outstanding bonds. Complainant charges and insists that such a sale as that contemplated by respondent, and shown by the exhibits hereto, would be a fraud in

law and in fact, on all the general creditors of respondent, and a clear loss to its stockholders. That its property would be sacrificed for the benefit of the bondholders, while the stockholders and general creditors would be cut entirely off from any benefit of the sale, and lose their debts and holdings."

Exhibit A referred to in the above extract furnishes no evidence of an intention or desire on the part of the directors to sell the property for only enough to pay off the bonds. That paper was an appeal to the stockholders to come to the relief of the corporation, by purchasing its bonds; and as an argument to induce a favorable response, they expressed the belief or conviction that if relief was not given, the property at such forced sale would not yield more than enough to pay the bond debt. A further remark: The sale was to be public, and to the highest bidder. For aught that is shown in this record there was no lien on the property beyond the thirty-four thousand dollars, bonded indebtedness, secured by the mortgage. Any one could claim to bid at the public sale, and any surplus the property might yield over the amount of the bonds would go to the other creditors till they were paid; and if any balance was left, that would go to the stockholders.

476 A mere general averment of fraud, as that a conveyance, or a sale, or other disposition, made or threatened, was or is with fraudulent intent, is not sufficient in pleading. Fraud is a conclusion. The conduct and facts from which the conclusion is deduced must be averred, so that issue can be formed on the averments. We do not mean that all the details must be given, but the substantial facts which constitute the bad faith must be set out. And to obtain relief, they must be proved, if denied: *Story's Equity Pleading*, sec. 251 a; *Flewellen v. Crane*, 58 Ala. 627; *Pickett v. Pipkin*, 64 Ala. 520; *Chamberlain v. Dorrance*, 69 Ala. 40. The bill in this case is insufficient, and should have been so pronounced in the court below.

We cannot know whether the facts in this case are such as to authorize an amendment of the bill so as to give it equity. We will therefore make no final order of dismissal: See *Gay v. Brierfield Coal and Iron Co.*, 94 Ala. 803; 33 Am. St. Rep. 122; *Corey v. Wadsworth* (Ala. June 14, 1892); *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357; *Birmingham etc. Co. v. Mutual Loan and Trust Co.*, 96 Ala. 364; *Goodyear Rubber Co. v. Geo. D. Scott Co.*, 96 Ala. 439. These are cases of the Present term.

Is this case one which authorized the appointment of a receiver? In 3 Pomeroy's Equity Jurisprudence, sec. 1431, it is said: "The appointment of a receiver is, as a general rule, discretionary. The discretion is not arbitrary or absolute; it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of promoting the ends of justice, and of protecting the rights of all the parties interested in the controversy and subject matter, and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding." This learned author divides the cases in which receivers should be appointed into four classes: "The first class contains those cases where there is no person entitled to the property, who is at the time competent to hold and manage it during the judicial proceeding": 3 Pomeroy's Equity Jurisprudence, sec. 1332. This class embraces the estates of infants, lunatics, and deceased persons, when it becomes necessary to have them preserved pending litigation. "The second class of cases is based upon the fact that all of the parties are equally entitled to the possession of the property which is the subject matter of the controversy, but it is not just and proper, from the nature of the dispute and of their relations with each other, that either one of them should be allowed to retain possession and control during the litigation": 3 Pomeroy's Equity Jurisprudence, sec. 1333. Controversies ⁴⁷⁷ between copartners and between tenants in common, and similar contentions, fall within this class. "The third class embraces those cases in which the person holding title to the property is in a position of trust or of *quasi* trust, and is violating his fiduciary duties by misusing, misapplying, or wasting the property, and is thereby endangering the rights of other persons beneficially interested": 3 Pomeroy's Equity Jurisprudence, sec. 1334. This class takes in the whole field of trusts and fiduciary holdings of property, and may be invoked by persons interested, if their rights exist *in presenti*, and sometimes when their interests are only *in futuro*. "Fourth class. This class contains those cases in which a receiver is appointed after judgment for the purpose of carrying the decree into effect": 3 Pomeroy's Equity Jurisprudence, sec. 1335. It would also take in the matter and duty of appointing a receiver whenever property or effects are discovered in proceedings under sections 3544-3545 of the code of 1886, if it becomes necessary to have such property and effects reduced

to possession, or otherwise cared for and preserved pending the litigation: *Montgomery etc. Ry. Co. v. McKensie*, 85 Ala. 546, 465. See, also, 1 Daniell's Chancery Practice, 1715 et seq.; Beach on Receivers, sec. 4 et seq.; High on Receivers, secs. 5 et seq.

The power to appoint receivers is, in all cases, exercised with great caution. There must be a legal or equitable right, reasonably clear and free from doubt, attended with danger of loss. The preservation of the subject of the controversy for the benefit of the party who will, ultimately, be decreed to have the right, is the object of committing it to the custody of a receiver: *Hughes v. Hatchett*, 55 Ala. 681; *Randle v. Carter*, 62 Ala. 95.

"Peril of the trust fund alone moves the court to displace the trustee from the exercise of his legal rights over the trust funds, pending litigation against him; and unless such peril is shown by specific allegations supported by clear proof the court ought not to interfere": *Satterfield v. John*, 58 Ala. 127. See, also, *Sims v. Adams*, 78 Ala. 895; *Ashurst v. Lehman*, 86 Ala. 370; *Moritz v. Miller*, 87 Ala. 831; *Thompson v. Tower Mfg. Co.*, 87 Ala. 783; *Simmons Hardware Co. v. Waibel*, 1 S. Dak. 488; 36 Am. St. Rep. 755.

In Gluck and Becker on Receivers, sections 27, 118, in this language: "It is not the province of a court of equity to take possession of the property, and conduct the business of corporations, except when the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor, which would otherwise be lost or greatly endangered, and which cannot be saved or protected ⁴⁷⁸ by any other action or mode of proceeding." In 5 Wait's Actions and Defenses, 355, it is said, "The appointment [of a receiver] is usually made for one of the following purposes: to prevent fraud, protect the property from injury, or preserve it from destruction."

In Kerr on Receivers, 5, that author employs this language: "The court, by taking possession at the instance of plaintiff, may be doing a wrong to the defendant; in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the court may, by its *interim* interference, have caused mischief to the defendant, for which the subsequent restoration of the property may afford no adequate compensation."

In *Brierfield Iron Works v. Foster*, 54 Ala. 622, this court

said, "The authority to appoint receivers should be used by a chancellor with great circumspection. Property is not taken from a party in possession, claiming in good faith the right to it, before judgment in actions at law, without first exacting from him at whose suit it is done ample security for the protection of his adversary against injury. Neither a writ in detinue, nor a writ of attachment for the seizure of property, can be obtained until the person suing it out shall execute an adequate bond with good sureties for the indemnification of the defendant against all loss he may thereby unjustly sustain. In courts of equity, writs of injunction and equitable attachment are allowed only upon like conditions; and a compliance with them is required by express statutory enactments. And whenever either of these writs will afford all needed protection to rights asserted by a plaintiff in a court of equity, and these rights are disputed, it should rarely appoint a receiver to take the property from the defendant; receivers being appointed ordinarily without indemnifying bonds being required of those procuring the appointment to be made, and only upon the bond of the receiver with sureties for his fidelity as such. There has been, indeed, too much facility on the part of chancellors and registers in the exercise of this authority."

We hold that, if the bill in this case be so amended as to give it equity, it would still, so far as we can now see, fail to present a case for a receiver. Injunction would probably be the proper remedial writ. We do not announce what would be our ruling, if it were shown that the governing body and management were acting faithlessly, or were wasting or destroying the property of the corporation. The present bill fails to show such is the case.

479 The order appointing a receiver is reversed, and the receiver will come to a proper settlement in the chancery court. And, unless the bill is so amended as to give it equity, the proper order will be made by the chancellor dismissing it out of his court.

Reversed and remanded. _____

CREDITOR'S SUIT—ALLEGATIONS NECESSARY IN BILL.—A creditor seeking relief against a fraudulent disposition of property by his debtor must state facts from which it may be inferred that the aid of a court of equity is required: *Dunkam v. Cox*, 10 N. J. Eq. 437; 64 Am. Dec. 460. A bill which alleges that complainants fear that their debtor will, if allowed to collect certain assets, apply them to the payment of other liens having no priority

over theirs, but which alleges no fraud on the part of the debtor, or combination between him and other creditors, charges no issuable fact which would justify the interposition of equity: *McGough v. Insurance Bank*, 2 Ga. 151, 46 Am. Dec. 382.

RECEIVERS, IN WHAT CASES WILL BE APPOINTED: See generally note to *Cortleyes v. Hathaway*, 11 N. J. Ch. 39; 64 Am. Dec. 478. In *Albany etc. Co. v. Southern Agricultural Works*, 76 Ga. 135, 2 Am. St. Rep. 26, several sets of facts are mentioned which justify such an appointment. If the case requires it, the court may appoint a receiver, though the bill contains no prayer for that purpose: *Shannon v. Hanks*, 88 Va. 338. The appointment rests so largely in the discretion of the trial court, that an order refusing one will not be changed unless it is evident that reasonable discretion has been abused: *Sanders v. Slaughter*, 89 Ga. 34; *Metropolitan Rubber Co. v. Atlanta Rubber Co.*, 89 Ga. 28; *Fluker v. Emporia City Ry. Co.*, 48 Kan. 577. In the last case it was held that the dissatisfaction of a minority of the stockholders of a corporation with its management by the majority is not, in the absence of fraud or insolvency, sufficient to authorize the appointment of a receiver at the instance of the minority. If the bill itself or the evidence shows that there is no fraud, and that the defendant is solvent, the appointment of a receiver is unauthorized: *Buckley v. Baldwin*, 69 Miss. 804; *Einstein v. Lee*, 89 Ga. 130. Speaking generally, before a receiver can be appointed, it is necessary that the plaintiff should have a probable cause of action against the defendant, and that the benefit to be derived from such cause of action might be lost if the receiver were not appointed: *Elwood v. First National Bank*, 41 Kan. 475. In an application for a receiver the court must look to the facts stated in the application: *Steele v. Aspy*, 128 Ind. 367.

NELSON v. SHELBY MANUFACTURING AND IMPROVEMENT COMPANY.

[96 ALABAMA, 515.]

VENDOR AND PURCHASER—MONEY PAID ON CONTRACT VOID UNDER STATUTE OF FRAUDS MAY BE RECOVERED, WHEN.—The amount paid on a contract for the sale of land may be recovered back, without any previous demand, in all cases where the purchaser has not subscribed a note or memorandum in writing within the meaning of the statute of frauds, and was not let into possession, so as to bring the contract within the exception provided in the statute, and the vendor has not subscribed a note or memorandum in writing within the requirements of the statute of frauds, and has not estopped himself from asserting the invalidity of the contract.

VENDOR AND PURCHASER—MEMORANDUM OF SALE.—A contract for the sale of land is not sufficient to satisfy the requirements of the statute of frauds if the precise terms of payment cannot be ascertained therefrom without resorting to parol evidence.

VENDOR AND PURCHASER—STATUTE OF FRAUDS—PAYMENT OF PURCHASE PRICE.—A contract for the sale of land invalid for the want of a sufficient memorandum is not rendered obligatory by the payment of the purchase money, in whole or in part, unless the purchaser has also, in pursuance of the contract, entered into possession of the land.

VENDOR AND PURCHASER.—MONEY PAID UPON A CONTRACT VOID UNDER THE STATUTE OF FRAUDS MAY BE RECOVERED as money had and received for the use of the purchaser, and a previous demand is not necessary.

APPEAL—RULING OF TRIAL COURT AS TO ADMISSIBILITY OF EVIDENCE, WHEN NOT REVIEWABLE.—An appellate court will not review the ruling of the trial court in regard to the relevancy or competency of a newspaper article which was offered in evidence, but is not properly set out in its entirety upon the record.

VENDOR AND PURCHASER—EVIDENCE ADMISSIBLE ON THE ISSUE OF POSSESSION BY PURCHASER.—Where, in an action by the purchaser to rescind a contract for the sale of town lots, and recover back money paid thereon, the vendor is seeking to show that the contract is rendered obligatory by the fact of the purchaser's having entered into possession, it is not error to allow the plaintiff to be asked, during his cross-examination, to designate the lots to which the contract relates upon a map of the town produced by the defendant. In such a case the plaintiff's ability to point out the lots may properly serve as a basis for argument in connection with other facts in evidence.

VENDOR AND PURCHASER—PURCHASER'S ENTRY INTO POSSESSION OF LAND, EVIDENCE ADMISSIBLE TO SHOW.—In an action by the purchaser to rescind a contract for the sale of land, and to recover back the purchase money paid thereon, it is competent, on the issue of his having entered into possession, to give in evidence his statements and admissions that he had offered the land for sale, or placed it in the hands of real estate agents, and to show that he has spoken of it as his property. Such evidence tends to establish claim of ownership and the exercise of control.

VENDOR AND PURCHASER—FRAUD FOR WHICH A CONTRACT MAY BE RESCINDED.—The failure to perform a mere promise or undertaking—something to be done in the future—does not authorize the rescission of a contract on the ground of fraud. It is the making of a promise, having no intention at the time to perform it, that constitutes fraud which justifies the rescission of a contract induced by such promise.

VENDOR AND PURCHASER—MEMORANDUM OF SALE NOT AUTHORIZING PURCHASER TO TAKE POSSESSION.—A receipt for the purchase money of land of the following tenor: "Received of F. N. one hundred and sixty-six dollars, being one-third cash payment on lot No. 28 of block No. 94. Bond for title to said lot will be delivered on execution of notes for balance of purchase money and return of this receipt duly indorsed"—does not authorize the purchaser to take possession of the land until there is a further compliance with the terms of sale.

APPEAL, OBJECTIONABLE STATEMENTS OF COUNSEL WILL NOT BE CONSIDERED ON, WHEN.—An objection to the statements of counsel cannot be considered on appeal, unless they have been duly excepted to at the time they were made, and a motion made to exclude them.

APPEAL—CHARGE AUTHORIZING JURY TO DISREGARD MATERIAL EVIDENCE. Where there is some evidence tending to sustain an issue raised by one of the parties to a suit, it is reversible error to grant an instruction which is tantamount to a declaration that there is no evidence on such issue.

Action to recover money paid as part of the purchase price of land. The plaintiff, during his cross-examination, was asked to designate on a map produced by the defendant the

lots mentioned in the receipts referred to in the opinion. On the objection of the plaintiff, the court refused to admit the map in evidence, but allowed the witness to look at the map and point out the lots in question. This use of the map was duly excepted to by the plaintiff, who also excepted to the following charges given at the request of the defendant. 1. "The plaintiff, in taking possession of the lots under the contract of sale in this case, would not be a trespasser. The receipt which the defendant gave to plaintiff authorized the plaintiff to take possession of the lots so purchased by him." "24. If the jury believe from the evidence, that, at the time of the sale, or afterwards, the plaintiff paid the defendant a part of the purchase money for certain lots, and was let into possession, then they must find for the defendant."

The defendant had judgment, and the plaintiff appealed from the motion denying a new trial.

Pettus and Pettus, for the appellant.

Knox and Bowie, for the respondent.

520 COLEMAN, J. The plaintiff, Nelson, sued in *assumpsit* to recover back money paid as a part payment for the purchase of certain lots sold to him by the defendant (appellee). The right to recover is based upon two grounds: 1. The invalidity of the contract of sale under the statute of frauds; and, 2. Actual fraud in the sale of the lots. It is conceded that there was no note or memorandum of the agreement in writing subscribed by Nelson, the plaintiff, or by other person for him, as required by the statute. The material facts of the sale and purchase, so far as the agreement is affected by the statute of frauds, are undisputed, and may be briefly stated as follows:

After extensive advertisement, on the first day of April, lots in the town of Shelby, Shelby county, were put upon the market for sale. A fixed valuation was placed upon the several lots, and those wishing to purchase drew for first, second, and third, etc., choice of lots at the valuation fixed. The town was platted and mapped, upon which could be seen the location and size of each lot by number and block, and its value, and this map was tacked down on a large table in the office of the company. When it became plaintiff's turn to select the lots he wished to purchase, he went into this office and selected thirteen lots located in different parts of the town, and of various valuations. As each lot was selected by the

plaintiff, a written memorandum, signed by the company's agent, was handed to him, and, when his selections were completed, he took the several memoranda into an adjoining room, to the treasurer of the company, made a one-third cash payment, and received from the treasurer of the company a written receipt for the cash payment, and statement of the contract of sale. Similar memoranda of the selection, and receipts for the one-third cash payment, ⁵²¹ were executed for each of the thirteen lots, but, as they were similar, it is necessary to set out only one of each. At the time of the selection of a lot by a purchaser, the memorandum given was as follows: "Sold to Frank Nelson, Jr., 1 lot, 1 R. 70, block 63, \$10.00. For the Shelby Mfg. & Improvement Co., by J. Schwed." Upon its presentation to the treasurer, and the payment of the one-third cash payment, a written instrument, as follows, was executed and delivered to the purchaser: "No. 277. Shelby Manufacturing and Improvement Co., Shelby, Ala., April 3d, 1890. Received of Frank Nelson, Jr., two hundred and thirty-three 88-100 dollars, being one-third cash payment on lot No. (1) of block No. 63. Bond for title to said lot will be delivered on execution of notes for balance of purchase money, and return of this receipt properly indorsed. T. H. Hopkins."

Suit was brought to recover back the cash payment, without an offer to execute notes for the balance of the purchase money, and without previous demand, or further notice of an intention not to abide by the purchase. The ability and readiness of the vendor to carry out its agreement and make good and sufficient bond for title was not questioned. Whether the plaintiff ever had actual possession of the lots, or either of them, was a controverted question on the trial. There was no objection or hindrance to his taking possession of twelve of the lots purchased, at any time, if the purchaser had seen proper to exercise the privilege. There is some contention as to one of the lots.

We will first consider the question upon the hypothesis that plaintiff in fact never took actual possession, and see whether upon this hypothesis he is entitled to recover back the purchase money paid. The present statute of frauds (code, sec. 1732), provides, that "In the following cases every agreement is void, unless such agreement, or some memorandum thereof, expressing the consideration, is in writing, and subscribed by the party charged therewith, or some other

person by him thereunto lawfully authorized in writing": Subd. 5. "Every contract for the sale of lands, tenements, or hereditaments, or any interest therein, except leases for a term not longer than one year, unless the purchase money, or a portion thereof, be paid, and the purchaser be put in possession of the land by the seller." The old statute of frauds read as follows: "No action shall be brought upon any contract for the sale of lands, tenements, or hereditaments, or the making any lease thereof for a longer term than one year, unless the promise or agreement, upon which such action shall be brought, or some memorandum ⁵²² or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized": Clay's Digest, p. 254, sec. 1.

Under the older act, that to be found in Clay's Digest, page 254, section 1, it was held that a part performance, such as the payment of a part of the purchase money, and possession, or even possession without payment, when taken in pursuance of, and under the contract, with the assent of the vendor, was sufficient to take the agreement outside the operation of the statute of frauds: *Danforth v. Laney*, 28 Ala. 274. In such cases, notwithstanding the statute of frauds, both parties were bound. The vendee could enforce specific performance against the vendor, although his agreement to sell was wholly in parol: *Danforth v. Laney*, 28 Ala. 274.

To take an agreement for the sale of land out of the influence of the present statute of frauds, when there is no sufficient note or memorandum in writing, there must be a payment in whole or in part of the purchase money, and, in addition thereto, the purchaser must be put in possession of the land by the seller. When there has been a part payment of the purchase money, and possession of the land by the purchaser, the contract for the sale of land is excepted from the statute by its terms, and is mutually binding and enforceable by either party.

We need not consider the difference of the legal effect of the substitution of the word "subscribed" in the later act for the word "signed" as used in the older act, and the further difference that under the present act the agent who signs must have written authority. Excepting these two differences, the language of the two acts is precisely the same—"and subscribed by the party to be charged." A sound rule of interpretation requires that the same legal significance and

effect be placed upon the language "subscribed by the party to be charged," used in the present statute, as judicially declared under the former act. Many decisions had been rendered by the highest court of this state construing the statute of frauds enacted by the legislature, as stated in Clay's Digest, and were in force when the present statute (both using, in this respect, the same language) was adopted; and we cannot suppose the legislature was ignorant of the judicial construction placed upon the statute by other courts and by this court, when the later act was adopted.

In the case of *Allen v. Booker*, 2 Stew. 21, 19 Am. Dec. 88, the plaintiff, Booker, sued to recover back money paid upon the purchase ⁵²⁸ of land. The contract of sale was wholly in parol, and there was no proof of possession. The question of the ability and readiness of the vendor to comply with the terms of the contract was not raised. The trial court charged the jury that the mere payment of the purchase money took the contract out of the operation of the statute of frauds, and that plaintiff could compel a specific performance on the part of the vendor, and for this reason the plaintiff could not abandon the contract and recover back the amount paid. Exception was taken to this charge; and, reviewing it, this court held that the payment of part of the purchase money alone did not authorize a decree of specific performance. The court held that the suit was well brought, and reversed the case.

In *Keath v. Patton*, 2 Stew. 38, the suit was in trover, to recover the value of horses which were paid as payment for the purchase of land. The contract of sale was wholly in parol. There was no proof of possession of the land. The case, as presented on appeal, did not involve a consideration of the statute of frauds, as the plaintiff failed to prove title, or a conversion, or value of the horses. The court stated that the plaintiff might have recovered in detinue without a previous demand and refusal to deliver the horses, if the defendant had refused to perform the contract, and that if the formal requisite had been satisfied by proof on the trial, the judgment would be reversed on the authority of *Allen v. Booker*, 2 Stew. 21; 19 Am. Dec. 88.

In the case of *Meredith v. Naish*, 3 Stew. 207, the plaintiff sued to recover a balance due in parol for unpaid purchase money for land. It was held that part payment of the purchase money and possession of the land would authorize a

specific performance of the contract, and would therefore entitle the plaintiff to a recovery. In *Cope v. Williams*, 4 Ala. 362, a case frequently cited in our opinions, referring to *Allen v. Booker*, 2 Stew. 21, 19 Am. Dec. 38, it is said that the right to recover back the purchase money rested upon the principle that there was no such part performance by the vendee as to authorize him to enforce a specific performance of the contract against the vendor, and he would be remediless if he could not maintain the action, and that in *Meredith v. Naish*, 3 Stew. 207, it was held that the unpaid purchase money could be recovered, because the vendee could enforce a specific performance of the contract against his vendor.

In *Johnson v. Hanson*, 6 Ala. 351, 41 Am. Dec. 54, it was held that when the contract was wholly in parol a vendor could not recover the balance of the purchase money due for the land, although ⁵²⁴ the vendee had paid a part of the purchase money, and was in possession of the land. The case is cited to show the principle of law recognized by the court. The conclusion is placed upon the proposition that "the contract conferred no rights upon either party." This case may not be in harmony with the other cases in our court as to the application of the law to the facts, but the conclusion of the court is rested upon the principles of law clearly recognized in the other cases.

In *Bates v. Terrell*, 7 Ala. 129, it was held that a vendor could not maintain an action upon a promissory note which did not state the terms of the contract, given for land, although the vendee had paid a part of the purchase money, and was in possession, there being no undertaking on the part of the vendor which imposed a legal obligation. The case of *Bates v. Terrell*, 7 Ala. 129, was virtually overruled in *Rhodes v. Storr*, 7 Ala. 346, in which the court held that where a note was given for the purchase of land, the contract was executed so far as the purchaser was concerned, and that he could not resist payment, so long as the vendor was willing and able to perform any thing which, in good conscience, he was bound to do. The conclusion of the court in *Rhodes v. Storr*, 7 Ala. 346, was reaffirmed in *Gillespie v. Battle*, 15 Ala. 276. In this latter case, however, the principle is recognized that the acceptance of the note given for the land, and possession thereof by the purchaser, had placed the vendor in such a condition as to authorize the enforcement of a specific performance of the agreement against him. "It cannot be said," says the

court, "that the consideration has wholly failed, since the defendant has derived, and continues to enjoy, an essential benefit conferred by the contract, and since the plaintiff has placed himself in a condition which enables the defendant, upon the payment of the purchase money, to enforce a specific performance of the agreement."

In *Donaldson v. Waters*, 35 Ala. 107, there was no writing evidencing the sale except the receipt for a part of the purchase money. The proof showed that the purchaser took possession of the property. The suit was in *assumpsit* to recover back the purchase money. It was held that plaintiff could not recover unless a rescission of the contract, prior to the bringing of the suit, was shown; and the burden of this proof rested on the plaintiff. The same case is reported in *Donaldson v. Waters*, 30 Ala. 175, and *Waters v. Spencer*, 22 Ala. 460; and the doctrines declared in *Cope v. Williams*, 4 Ala. 362; *Allen v. Booker*, 2 Stew. 21; 19 Am. Dec. 33; *Meredith v. Naish*, 3 Stew. 207, were affirmed.

Other cases might be cited, but these embrace the principal ⁵²⁵ adjudications by this court in the construction of the statute of frauds, as it stood in Clay's Digest, upon the question involved, and now under consideration. The old statute contained the same phrase as the present—that the note or memorandum must be "subscribed [signed] by the party to be charged therewith." In none of the earlier cases was it held that a purchaser could recover back the purchase money paid unless the evidence showed that the vendor had rescinded the contract, or that the contract of sale was not obligatory upon the vendor, and could not be enforced against him, or that he was not able to comply with his undertaking. These decisions do not go the extent of sustaining the contention that the purchase money could not be recovered back by the purchaser in cases where the contract was void as to both parties, merely because the vendor was willing to comply with the terms of the sale, but was not legally bound to do so.

The following adjudications were made after the enactment of the present statute of frauds: *Flinn v. Barber*, 64 Ala. 193. The plaintiff sued to recover back money paid on a contract for the sale of land. This court determined from the evidence that "the transaction rested wholly in parol; nor was it disputed that defendant had no title to, or estate in, the premises, and that he had not, under the agreement, let the plaintiff into possession." This being the proo'

under all the authorities, the plaintiff was entitled to recover. Much is said in this opinion, perhaps, not necessary to a conclusion upon the facts, but the *gravamen* of the argument is to show that if the vendor is not bound, "if he has the unqualified right to repudiate the contract, then there is no contract, and no right upon which he can retain the money." It was further held, that the mere willingness and ability of the vendor to comply, independent of the legal right of the vendee to enforce a compliance, would not authorize a retention by him of the money paid by the purchaser; and the principles declared in the earlier decisions, which have been cited, are clearly recognized throughout the opinion, that when there had been such a part performance as would authorize either party to enforce a specific performance against the other, that neither could repudiate the contract. The case of *Chambers v. Alabama Iron Co.*, 67 Ala. 353, was a bill for specific performance. Only one of the parties—the defendants in the bill—subscribed the writings. It is said, "When a party accepts and acts upon an agreement of this character, conferring benefits upon him, he is bound, though he may not sign it or subscribe ⁵²⁶ it, to the performance of the duties and obligation it imposes; and, while he may claim specific performance from the party signing, the converse right exists against him, and from him specific performance may be compelled."

In many English cases, and in some of the states, it is held that money paid on a purchase of land cannot be recovered back, if the vendor is able and willing to carry out the contract of sale, although he may be under no legal obligation to perform. We are of opinion that this principle has never prevailed in this state. In *Flinn v. Barber*, 64 Ala. 193, it is said that the validity of the contract does not depend upon the willingness or election of the vendor, but upon the sufficiency of the written note or memorandum of the contract of sale, subscribed by him, to make it obligatory upon him, or upon such a part performance by the vendee, as to remove the contract from the operation of the statute of frauds, so that it became mutually binding. We find nothing in the earlier or present statute of frauds which supports the conclusion that a contract not enforceable against a vendor as provided in the former, or which is declared void as to him by the present statute, because there is no sufficient written note or memorandum of the agreement to comply with its

mandates, subscribed by him, and which affords the vendor complete protection against his vendee, may, by his election or willingness to perform, avoid the statute, and convert a contract it declares void into a valid agreement, enforceable against a vendee, who has subscribed no note or memorandum of the agreement and has done no more than pay a part of the purchase money. In such case, neither party is bound, and the contract is void by the very terms of the statute itself. A contract void under the statute of frauds is void for all purposes.

The rule here declared is not at variance with the principle "that the only signature required is that of the party against whom the contract is to be enforced," and that there may be contracts which, by reason of the statute of frauds, may be enforced by one party, though not by the other: Benjamin on Sales, c. 7, sec. 174; *Heflin v. Milton*, 69 Ala. 354; *Manning v. Pipen*, 86 Ala. 357; 11 Am. St. Rep. 46; 95 Ala. 537.

The following conclusions of law are deducible from the foregoing authorities, and sustained by principles of justice, and are applicable to the facts of this case: 1. That a purchaser of land, who has paid in part or in whole the purchase money under his contract of purchase, cannot repudiate the contract and sue and recover back the money paid when there has been such a part performance on his part ⁵²⁷ as to entitle him to enforce a specific performance of the contract against his vendor, if the contract itself is free from fraud, and there has been no rescission of the agreement, and the vendor is able to perform; 2. A purchaser cannot recover back money paid on a purchase of land, although he may not have signed or subscribed any note or memorandum in writing himself, as required by the statute of frauds, and may not have gone into possession of the land, if the vendor has on his part so complied with the statute of frauds by his written note or memorandum, as that he may be compelled to perform his contract by a court of equity, or held liable in damages for a breach thereof in any court of jurisdiction, and the contract itself is free from fraud in fact; 3. Where the contract for the sale of land is binding upon the vendor, and may be enforced against him, and the consideration of his obligation was the payment, in whole or in part, of money by a purchaser, and the vendor's obligation is accepted and held by the vendee in consideration of the money paid by him, the

purchaser cannot, after receiving such benefit, at his election avoid the contract, so far as to entitle him to recover back the consideration paid, whether he subscribed any note or memorandum himself or not of the contract of sale, and without regard to the rights of the vendor to recover any unpaid balance of the purchase money. If the contract was free from actual fraud, and the vendor is able to comply with his undertaking. In such a case the benefit to the promisor and detriment to the promisee is a sufficient consideration to support the contract against the promisor, at least so far as it has been executed by him by payment of the money; 4. That a purchaser of land may recover back the amount paid (without previous demand) in all cases where the purchaser has not subscribed a note or memorandum in writing within the meaning of the statute of frauds, and was not let into possession, so as to bring the contract within the exception provided in the statute, and the vendor has not subscribed a note or memorandum in writing, within the requirements of the statute of frauds, and has not estopped himself from asserting the invalidity of the contract. In such cases, there is no binding obligation upon either party—the vendor has parted with nothing, and the vendee has received nothing—and the money in the hands of the vendor *ex æquo et bono* belongs to the purchaser.

The next question is as to the sufficiency of the note or memorandum subscribed by the vendor, or his lawfully authorized ⁵²⁸ agent, as a compliance with the statute of frauds, so as to create a legal obligation on his part. The receipt for the money is as follows: "Received of Frank Nelson, Jr., \$166.66, being one-third cash payment on lot No. 28 of block No. 94. Bond for title to said lot will be delivered on execution of notes for balance of purchase money and return of this receipt properly indorsed." We are of opinion the note or memorandum subscribed by the vendor to execute bond for title as contained in the receipt for the money paid was void under the statute of frauds, and a failure to perform it by the vendor would give the plaintiff no cause of action against him. The rule that parol evidence may be introduced to supply defects and omissions in written instruments, which do not vary or contradict its terms, applies only to contracts which are valid; but parol evidence is not admissible to render valid, undertakings which are void by reason of the statute of frauds. We may concede the mem-

orandum to be complete in all respects except as to the terms of the payment. It says, one-third cash, and "notes to be executed for the balance." Whether these notes are to bear interest, and if so, the rate of interest, or to be payable in one, two, or ten years, or whether there are to be two or a half dozen notes, is not stated. To permit parol evidence to be introduced to supply the omission would break down the safeguards intended to be secured by the statute in all contracts for the sale of land. In *Jenkins v. Harrison*, 66 Ala. 345, 354, it is said: "The written statement must contain, either expressly, or by necessary inference, all the terms of the agreement; that is to say, the names of the parties, the subject matter of the contract, the consideration, and the promise, and leave nothing open for future treaty"; and to the same effect is the case of *Phillips v. Adams*, 70 Ala. 376. "If the note or memorandum shows only a treaty pending, and not a contract concluded, or if it annex conditions, or otherwise make variations, it has no effect as a memorandum to bind the party from whom it proceeds. The note should express the consideration, the terms, the parties, the property, and be signed by the party to be charged, or his agent": *Carter v. Shorter*, 57 Ala. 258. No specific performance of a contract can be decreed in equity, unless the contract be actually concluded, and certain in all its parts. If the matter rests in treaty, or if the agreement in any material particular be uncertain or undefined, equity will not interfere: *Fry on Specific Performance*, secs. 164, 202; *McKibbin v. Brown*, 14 N. J. Eq. 13.

⁵²⁹ In *Carroll v. Powell*, 48 Ala. 298, cited in *Carter v. Shorter*, 57 Ala. 258, the memorandum, after describing the land, stated as follows: "Bought by A. Carroll at \$400." Commenting on this entry, the court uses the following language, Peck, C. J. rendering the opinion: "It does not state the terms of the sale, whether for cash or on a credit. It is, however, insisted that as it is not stated whether the sale was for cash or on a credit, the law presumes it was for cash. Admit this to be true in ordinary sales, it does not, in cases like the present, answer the requirements of the statute. The statute requires the terms of the sale to be stated as a part of the memorandum. If the terms of the sale, or any of them, depend upon inference, or stand upon a legal presumption, such inference or presumption may be rebutted by oral evidence. This would leave the terms of the sale uncertain and

to be determined by the evidence of witnesses, and thus the doors to frauds and perjuries would be opened, which the statute intended to close." See, also, *Adams v. McMillan*, 7 Port. 73. It follows from the foregoing conclusions that unless, in addition to the part payment of the purchase money, "the purchaser be put in possession of the land by the seller," the contract of sale is void as to both parties under the statute of frauds, and furnishes no right to have a specific performance decreed, or a cause of action for a breach of the contract of sale. Where the contract rests wholly in parol, the mere ability of the vendor to let the purchaser into possession, and his assent that the purchaser may take possession are not enough. There must be an actual voluntary taking of possession by the purchaser, and in pursuance of his contract for the sale of the land. If he refuse to go into possession, there is no legal authority to compel him to do so. Unless there is payment of the purchase money in whole or in part, accompanied with possession, the contract is not taken out of the provision of the statute, and imposes no obligation on either party.

Can the action be maintained without a previous demand? The authorities are almost uniform to the effect that contracts for the sale of land, although they contravene the statute of frauds, are not strictly void; and, to avoid the contract on the ground that it is offensive to the statute of frauds, it must be pleaded specially. If waived, and the contract is proven, it will be enforced: *Shakespeare v. Alba*, 76 Ala. 355; *Comer v. Sheehan*, 74 Ala. 452; *Cooper v. Hornsby*, 71 Ala. 62; *Espalla v. Wilson*, 86 Ala. 491; *Jonas v. Field*, 83 Ala. 447; *Lewis v. Teal*, 82 Ala. 290; *Gillespie v. Battle*, 15 Ala. 276; *Patterson v. Ware*, 10 Ala. 447. It is equally a well-settled rule that, if it affirmatively appear in a bill filed to enforce a contract, void under the statute of frauds, advantage may be taken of it by demurrer: *Lewis v. Teal*, 82 Ala. 290; *Phillips v. Adams*, 70 Ala. 373; *Bolling v. Munchus*, 65 Ala. 558. The same principle is applicable in a court of law, if the complaint affirmatively shows that the contract counted on is void under the statute of frauds. No presumption arises under a contract void under the statute of frauds, that its nullifying defects will be waived by either party, and neither has a right to assume that it will be by the other party. If the contract is void under the statute of frauds, there is nothing to rescind—the agreement, so long as it remains unexecuted,

vests neither party with any legal rights as against the other: *Hughes v. Hatchett*, 55 Ala. 544. Money paid, or property delivered, under such conditions is held simply as money or property had and received for the use of the owner, and a previous demand is not necessary. If the holder received the money through actual fraud on his part, and has parted with nothing, suffered no detriment in consideration, a previous demand was not a prerequisite to the maintenance of a suit by the owner to recover it back: *Keath v. Patton*, 2 Stew. 38; *Allen v. Booker*, 2 Stew. 21, 19 Am. Dec. 33; *Rutherford v. McIvor*, 21 Ala. 750.

The plaintiff offered in evidence an article which appeared in the *Montgomery Advertiser* prior to the sale, and designated a "write up." The article is not set out in the record, and this court cannot judge of its relevancy and competency. The same objection applies to certain extracts from the article, which are given in the record. It may be that if the whole article, or the context to the extracts, were set out, a different significance would attach to the extracts than when read disconnected. It would be an unsafe practice for this court to presume the trial court erred, when the facts upon which the ruling was predicated are not before this court: *Barwick v. Barkley*, 45 Ala. 217; *Parsons v. Woodward*, 73 Ala. 348; *Bynnm v. Southern Pump Co.*, 63 Ala. 465.

We see no objection to the testimony in permitting the witness to locate the lots on the map of the town. He had selected the lots on a map before purchasing, and the fact that he could point them out on the map at the trial was at least some evidence that he was to some extent acquainted with their location. It was *data* for legitimate argument in connection with other facts in evidence.

Statements and admissions of the plaintiff that he had offered the lots for sale, or placed them in the hands of real estate agents, or of his speaking of them as his property, ⁵⁸¹ were properly admitted. Such evidence tends to show claim of ownership, and the exercise of control. There is evidence that at the time of the sale notice was given that the vendor would retain the ownership and control of the houses then upon the lots. Whether the retention and renting out of the house situated in part on lots 27 and 28 by the vendor was in pursuance of the right thus reserved, until notified to remove the house, and subject to the right of the purchaser to enter and take possession of the lot purchased, or whether

such holding was adverse to the purchaser, was a fact to be determined by the jury.

In *Woodstock Iron Co. v. Roberts*, 87 Ala. 441, it was held, that it was competent for a witness to testify "that the defendant went into possession of the lands and thereafter controlled them." In *South and North Alabama R. R. Co. v. McLendon*, 63 Ala. 266, it is said: "The true line of distinction is this, an inference necessarily involving certain facts may be stated without the facts, the inference being the equivalent of a specification of the facts. It is termed "a shorthand rendering of the facts": *Elliott v. Stocks*, 67 Ala. 290; *Turnley v. Hanna*, 82 Ala. 139. The showing made by the witness Lapsley contains this statement, "The balance due in one and two years from date of first payment." This statement was not admissible to supply a defect or omission in the written note or memorandum of the contract of sale, but was admissible upon the contention that there was a complete verbal contract for the sale of the land, and the payment of a part of the purchase money, and possession by the purchaser, so as to bring the contract of sale within the exception provided by the statute. Where a party makes a written showing as to what an absent witness will prove, and facts are stated in the language decided by this court to be competent, and, for the purpose of a trial, the statement by consent is admitted as evidence, it is too late, after the trial has begun, for the opposite party to raise an objection to it on the grounds that he has no right to cross-examine the witness, and to require of him explanations of his statements and the sources of his information.

The objection to the argument of opposing counsel cannot be sustained. There was no exception taken at the time to the statements deemed objectionable, and no motion to exclude them. We need not consider whether there was any such improper statement of facts as to transcend the boundary of legitimate argument: *Cross v. State*, 68 Ala. 484; *Jackson v. Robinson*, 93 Ala. 158; *Alabama etc. R. R. Co. v. Frazier*, 93 Ala. 46; 30 Am. St. Rep. 28; *Lunsford v. Dietrich*, 93 Ala. 571, 572; 30 Am. St. Rep. 79.

522 Under our view of the case, it becomes unnecessary to consider at much length the question of actual fraud, and the many assignments of error upon exceptions taken to the rulings of the court upon questions of evidence applying to this feature of the case. The suit was not brought to recover

damages for a breach of any of the promises or guaranties, if any were made, as to improvements to be constructed in the future. The failure to fulfill a mere promise or undertaking—something to be done in the future—alone, will not authorize a rescission of a contract upon the ground of fraud. It is the making of such promise, having no intention, at the time, to perform it, that constitutes fraud for such a contract may be rescinded: *Birmingham Warehouse and Elevator Co. v. Elyton Land Co.*, 93 Ala. 553, and authorities cited; *Montgomery etc. R. R. Co. v. Matthews*, 77 Ala. 357; 54 Am. Rep. 60. Evidence of representations or promises or guaranties of enterprises to be carried out in the future were admissible only for the purpose of showing actual fraud; and to have this effect it must appear that the promisor had no intention to perform at the time they were made. As to any fact proven by plaintiff which tended to show such fraudulent purpose or intention on the part of the seller as to promises to be performed in the future, it was competent to rebut such proof by showing that the promises were made in good faith; and facts which reasonably accounted for the failure of the enterprises or promises were admissible in rebuttal. When fraud *vel non* is the issue, great latitude is allowed the plaintiff, and the defendant is entitled to introduce evidence in rebuttal repelling injurious inferences.

Charges numbered 16 and 24 were erroneously given, and must operate to reverse the case. The first clause of charge 16 is not as unambiguous as it might have been written, but we are not prepared to say the words, "the plaintiff, in taking possession of the lots," are not sufficiently qualified and limited, by the words, "would not be a trespasser," to prevent the charge from being open to the objection that the charge assumed that plaintiff did take possession of the lots. The latter clause of the charge is objectionable, in that it declares that the receipt alone given to plaintiff for the money paid, authorized the plaintiff to take possession of the lots. There is nothing in the receipt which gave the plaintiff the legal right to take possession of the lots under the contract of sale, upon the payment of one-third of the purchase money in cash, without and until the execution of the notes. The vendor, of course, could have granted the privilege, ⁵³² and if the evidence of Mr. Bush is correct, and we may add, it is not disputed in this respect, he authorized purchasers to take possession of the lots under the receipts, and before the note

were executed, but the right thus given was under the verbal privilege, if given, and not by virtue of the receipt itself. Without verbal or written permission to that effect, before the notes were executed, there is nothing in the receipt which authorized the purchaser to take possession of the lots until there was a further compliance with the terms of sale. If the purchaser was placed in possession by the vendor, that, in connection with the part payment of the purchase money, was sufficient to except the contract from the statute, notwithstanding the insufficiency of that receipt. Charge 24 ignores all the evidence introduced for the purpose of showing actual fraud, in the sale. It was not for the court to declare that there was no evidence which authorized the jury to infer that there were fraudulent representations as to existing facts, or material representations or promises as to future improvements, made with the intent to deceive, and without purpose to perform, and upon which the plaintiff relied and had a right to rely. However unsatisfactory the court may have considered the evidence on this phase of the case, it was for the jury to determine the *bona fides* of the representations and statements and promises of future performance, if any were made, from all the evidence.

The evidence tended to show that the purchase of each lot involved a separate and distinct contract. The jury may have believed that plaintiff was put in possession of some of the lots, and yet not of all of them. There was a separate count for the recovery of the purchase money paid on each lot, and then one count for the whole of the purchase money paid on them all. The jury may have been satisfied that the purchaser was put into possession of certain lots, and not of all the lots. The use of the words "certain lots" in this charge in the connection used, when referred to the evidence, was certainly misleading, if not positively erroneous.

We deem it unnecessary to pass upon each assignment of error, specifically, as the principles of law we have declared dispose of every exception reserved.

For the errors pointed out, the case must be reversed.

Reversed and remanded. _____

VENDOR AND PURCHASER.—RECOVERY OF PURCHASE MONEY, WHEN PERMISSIBLE GENERALLY: See *Baston v. Clifford*, 68 Ill. 67; 18 Am. Rep. 547. The doctrine referred to by the court in the principal case, as prevailing in many states—that purchase money paid on a contract within the statute of frauds cannot be recovered on the ground of the invalidity of the contract,

If the vendor is ready and willing to perform it—is enunciated in the following cases in the series: *Coughlin v. Knowles*, 7 Met. 57; 39 Am. Dec. 759; *Sims v. Hutchins*, 8 Smedes & M. 328; 47 Am. Dec. 90; *Cobb v. Hall*, 29 Vt. 510; 70 Am. Dec. 432; *Galwey v. Shields*, 66 Mo. 313; 27 Am. Rep. 351; *Day v. Wilson*, 83 Ind. 463; 43 Am. Rep. 76; *McKinney v. Harvie*; 38 Minn. 18; 8 Am. St. Rep. 640; *Contra: Scott v. Bush*, 26 Mich. 418; 12 Am. Rep. 311; *Brown v. Pollard*, 89 Va. 696. An action for money had and received is the proper remedy for the recovery of purchase money: *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178; *Wright v. Dickinson*, 57 Mich. 580; 11 Am. St. Rep. 602.

VENDOR AND PURCHASER.—PAYMENT OF PURCHASE MONEY UNACCOMPANIED BY POSSESSION is not sufficient to validate a contract void under the statute of frauds: *Brown v. Pollard*, 89 Va. 696; *Gangwer v. Fry*, 17 Pa. St. 491; 55 Am. Dec. 578; *Myers v. Byerly*, 45 Pa. St. 368; 84 Am. Dec. 497; *Allen v. Booker*, 2 Stew. 21; 19 Am. Dec. 33; *Johnston v. Glancy*, 4 Blackf. 94; 28 Am. Dec. 45; *Blanchard v. McDougal*, 6 Wis. 167; 70 Am. Dec. 458; *Pinnock v. Clough*, 16 Vt. 500; 42 Am. Dec. 521; *Baldwin v. Palmer*, 10 N. Y. 232; 61 Am. Dec. 743; *Greenlees v. Roche*, 48 Kan. 508; *Brownfield's Exrs. v. Brownfield*, 151 Pa. St. 565; *Louisville etc. Ry. Co. v. Philpau*, 94 Ala. 463; *Hickman v. Withers*, 83 Tex. 575; *East Tenn. etc. Ry. Co. v. Davis*, 91 Ala. 615; *Guthrie v. Anderson*, 47 Kan. 383; 49 Kan. 416; *Price v. Bell*, 91 Ala. 180; *Frank v. Riggs*, 93 Ala. 252. The possession, to have the effect of validating the contract, must be referable thereto: *Poland v. O'Connor*, 1 Neb. 50; 93 Am. Dec. 327; *Foster v. Maginnis*, 89 Cal. 264; *Nibert v. Baghurst*, 47 N. J. Eq. 201; *Rogers v. Wolfe*, 104 Mo. 1.

VENDOR AND PURCHASER—SUFFICIENCY OF MEMORANDUM.—The essential facts necessary in a memorandum of a contract for the sale of lands are the subject matter of the sale, the terms, and the names or description of the parties: *Mentz v. Neuwitter*, 122 N. Y. 491; 19 Am. St. Rep. 514. In *Cosack v. Descoudres*, 1 McCord, 425, 10 Am. Dec. 681, the following receipt was held sufficient: "Received of C twenty dollars, being on account of a plantation on the Cypress, sold to him this day for two thousand dollars, payable in different installments." The addition of the last clause clearly distinguishes this memorandum from the one in the principal case. The omission of a provision for the possession will not invalidate the agreement: *Muxro v. Edwards*, 86 Mich. 91.

FRAUD.—MAKING A PROMISE WITH NO INTENTION OF PERFORMING IT is a fraud for which a contract may be rescinded: *Lawrence v. Gayetty*, 78 Cal. 126; 12 Am. St. Rep. 29. The ground of action, in such cases, is not representation, but the contract arising from the promise: *People v. Healy*, 128 Ill. 9; 15 Am. St. Rep. 90; *Knowlton v. Keenan*, 146 Mass. 86; 4 Am. St. Rep. 282; *Davis v. Morris*, 149 Mass. 188; 14 Am. St. Rep. 404.

COPELAND v. PHENIX INSURANCE COMPANY.

[96 ALABAMA, 615.]

FIRE INSURANCE—DOUBLE INSURANCE, POLICY NOT AVOIDED BY, WHEN.

A policy of fire insurance, containing the stipulation against "other insurance," is not invalidated by the fact that, at the time of its issuance, a prior policy covering the same property is in existence, unless the assured has an interest in such prior policy, or will derive a benefit under it in the event of the property's being burned.

J. M. Chilton, and Oliver and Oliver, for the appellants.

Sanford and Thomas, for the respondents.

616 **STONE, C. J.** This case has been twice before in this court, and most, if not all, of the legal questions have been settled: *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551; 90 Ala. 386. From the last trial in the court below only the rulings on the pleadings are presented for our revision.

The complaint counts on a policy of insurance, insuring a residence against injury or destruction by fire, and alleges that the building was destroyed by fire during the term covered by the policy. There were many pleas interposed, but the defense was rested mainly on two grounds: 1. That in obtaining the insurance the title of the property was misrepresented as being unencumbered, whereas it was under two subsisting mortgages for specified, large sums; and 2. That it was represented there was no other insurance on the property, when in truth and in fact there was then existing an older, unexpired policy, insuring the property against fire to the extent of eight hundred dollars.

Of the pleas to which plaintiff's demurrers were overruled, and which rulings are assigned as error, the one numbered 9 sets up in bar of the action that at the time the policy was sued out there were large, unsatisfied mortgages on the property, and that the policy contained a stipulation that such encumbrance should render the policy void. Pleas 10, 14, 15, 16, 18, 19, 20, and 21 each avers that it was one of the provisions of the policy that if there were any other insurance on the property, either prior or subsequent, such other insurance should render this policy void, unless written consent for the additional insurance should be indorsed on the policy. Each of these pleas then avers that without such consent being obtained, there was an older existing policy of insurance on the property. And plea 19 also avers that the property was under said mortgage encumbrances.

Pleas 16 and 18 fail to state the amount, or any amount, of such prior insurance, and on that account are possibly imperfect. This omission is not assigned as a ground of demurrer, and we will not notice it. There is, however, an important omission in plea No. 18, which the demurrer brings to the attention of the court. That plea is in the following language:

"For further plea defendant says that at the time of the issuance of said policy one John T. Roberts procured the same for his wife, Mrs. Dora Roberts, and stated to defendant's agent that there was no other insurance on said property, when in truth there was another policy of insurance at that time covering the house that was burned. Said prior ⁶¹⁷ policy was issued December 20, 1886, by the Central Insurance Company, favor of A. F. Copeland, payable to the New England Mortgage and Security Company. And defendant avers that said representation was untrue. Defendant avers that the policy sued on was issued on the faith of said statement." One of the grounds of demurrer to plea 18 was and is, "Said plea fails to state any facts showing that said policy was for the benefit of Mrs. Dora Roberts."

We hold this ground of demurrer well taken. If Mrs. Roberts had no interest in this older policy we are at a loss to conceive how it could influence her conduct, or how the fact of such other insurance issued to a stranger with whom she is not shown to have been connected could increase her recovery in the event the house should be burned.

There is another aspect of this question. To obtain fire insurance the applicant must be the owner of an insurable interest in the property sought to be insured. There are some interests less than absolute ownership which are treated as insurable, but a majority of the policies are issued on claims of complete ownership: See the authorities collated in *Commercial Fire Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 320; 60 Am. Rep. 162. The fact that the policy, the subject of the present suit, was issued to Mrs. Roberts, raises the presumption that she owned an insurable interest. She could not properly obtain the policy without such interest. What interest had Copeland in the property on which he could and did acquire insurance? Should not the plea have averred that Copeland, at the time he took out the policy, had an insurable interest, or should it not have shown in what manner Mrs. Roberts would become a beneficiary under it? Are

we to conjecture he had such interest, and on such conjecture avoid the policy afterwards issued to Mrs. Roberts. In the absence of averment in the plea that Mrs. Roberts had an interest in that older policy, or would derive a benefit under it in the event the house should be burned, upon what principle can we hold that such former policy issued, so far as the plea informs us, to a mere stranger bars her recovery in this suit? Each plea must stand or fall on its own averments.

Another view. The record in the present appeal does not contain a copy of that policy sued on. When the case was last before us—90 Ala. 386—the provision of the policy on which the defense we are considering was rested is set out, and is as follows: “If the assured shall have or shall hereafter make any other insurance (whether valid or not) on the property, without the consent of the company written hereon,” then the policy to be void. Mark the language: **§18** “If the assured shall have, or shall hereafter make, any other insurance,” etc. Mrs. Roberts is the assured. How can it be affirmed that a policy previously issued to Copeland constitutes other insurance to Mrs. Roberts, in the absence of averments showing her connection with, or interest in, that policy? The circuit court erred in overruling the demurrer to the 18th plea, and the same imperfection is found in pleas numbered 13 and 15, and to some extent in plea No. 20.

We hold that the circuit court rightly sustained demurrers to the replications.

Reversed and remanded.

FIRE INSURANCE.—DOUBLE INSURANCE TAKES PLACE when two or more insurances upon the same subject, the same risk and the same interest are taken by the owner of the property: *Clarke v. Western Assur. Co.*, 146 Pa. St. 561; 28 Am. St. Rep. 821; or by some one for his benefit: *Aetna Fire Ins. Co. v. Tyler*, 16 Wend. 385; 30 Am. Dec. 90. Where one of two co-owners of chattels insured his interest therein, and the other co-owner, without the knowledge or consent of the first, afterwards insured his interest in another company, it was held that the prior policy was not avoided, though it provided that the assured should notify the company of any other existing or after insurance applying to the property, or any part thereof, and that the policy should be void if the assured should fail to comply with its terms, conditions, or covenants, or if he should then or thereafter have any policy purporting to create insurance on the property or any part thereof, without the consent of the company indorsed on the policy: *Hall v. Concordia Fire Ins. Co.*, 90 Mich. 403.

ARP v. STATE.

[97 ALABAMA, 5.]

JURIES—MOTION TO QUASH VENIRE.—That some of the jurors summoned on a special venire to try a criminal case had served as regular jurors during the preceding week; that another had been summoned as a regular juror for the week of the trial and had not been a resident of the state or county for the preceding year, and that another had served as a juror at a term of the court in the same year, are not sufficient grounds for quashing the venire.

JURIES—CHALLENGES—INSUFFICIENT GROUNDS FOR.—That one of the jurors summoned in a criminal case was at the time serving as a juror in another case; that another had not been a resident of the state or county for the preceding year and was excused for cause; that another failed to answer when called; that another was over the age of seventy years and was challenged for cause; and that another, on his examination as to his competency, stated that he had heard a part of the evidence at the preliminary examination, and from that evidence had formed an opinion as to the guilt or innocence of the accused, and that, in his judgment, such opinion would not bias his verdict, constitute no ground of challenge to the jury selected to try the case.

CRIMINAL LAW—CRIME UNDER COMPELSION.—No man can excuse himself under the plea of necessity or compulsion for taking the life of an innocent person.

MURDER UNDER COMPELSION.—A man cannot excuse or justify the killing of an innocent man under the plea that compulsion was exerted and operated upon him at the time, and forced him to the commission of the act, if he might have avoided the necessity by escape before that time.

R. B. Smyer, for the appellant

W. L. Martin, attorney general, for the state.

• **COLEMAN, J.** At the July term, 1892, of the circuit court, the defendant was convicted of murder in the first degree, and sentenced to suffer death.

The defendant moved to quash the venire summoned:

1. Because some of the jurors summoned on the special venire had served as regular jurors during the preceding week;
2. Because William Jackson, who was summoned as a regular juror for the week, had not been a resident of the state or county for the preceding twelve months;
3. Because one C. H. McCullough, whose name appears on the venire served as a regular juror at the January term 1892. These several motions were properly overruled: *Crim. Code*, sec. 4301; *Fields v. State*, 52 Ala. 351; *Gibson v. State*, 89 Ala. 126; 18 Am. St. Rep. 96.

The objections to the impaneling of the jury were as follows:

1. That one of the jurors drawn failed to answer, it appearing

that said juror was at that time serving as a juror on another case, and was out considering that case. The second objection is the same as the first. 3. That one of the jurors drawn had not been a resident of the state or county for the past preceding twelve months, and was excused for cause; 4. That one of the persons whose name was drawn, who had been summoned to serve as a juror, failed to answer when called; 5. That one of the persons summoned as a juror was over the age of seventy, who was challenged by the state for cause; 6. That one of the persons summoned, on his examination as to his competency, stated that he had heard a part of the evidence at a preliminary examination of the defendant, and from that evidence had formed an opinion as to the guilt or innocence ⁷ of the defendant, but that in his judgment said opinion would not bias his verdict. Upon this statement the court pronounced the person competent to serve as a juror. Each of these objections have been adjudicated by this court, and declared to be without merit: See the following authorities: On the first and second propositions, *Johnson v. State*, 94 Ala. 40, and authorities cited; on the third proposition, *Fields v. State*, 52 Ala. 351, and *Gibson v. State*, 89 Ala. 126; 18 Am. St. Rep. 96; on the fourth, *Johnson v. State*, 94 Ala. 40; on the fifth, Crim. Code, sec. 4331, subd. 8; on the sixth, *Hammil v. State*, 90 Ala. 577. Neither of the objections come within the principle decided in the case of *McQueen v. State*, 94 Ala. 52, or of *Darby v. State*, 92 Ala. 9.

The confessions of the defendant were voluntarily made, and were properly admitted. Moreover the defendant himself, who testified in his own behalf, did not deny they were voluntarily made, but himself testified substantially as true the main fact given in evidence as confessions. The testimony of the defendant, and the evidence admitted as confessions, showed that he took the life of the deceased without provocation on the part of the deceased, and when there was no real or apparent necessity for the act so far as such necessity proceeded from the deceased. According to his own statement, the object to be accomplished by taking the life of the deceased was to prevent deceased from appearing as a witness against him, and one Burkhalter and Leith, charged with retailing whiskey without a license. The defendant's excuse for the homicide was that Burkhalter and Leith threatened to take his life unless he killed deceased; that they were present, armed with double-barreled shotguns, and threat-

ened to kill him unless he killed deceased; and that it was through fear and to save his own life he struck deceased with an axe. He admits that after having struck deceased down he rifled the pockets and took what money was found in the pockets of the deceased.

On this phase of the evidence the court was asked to give the following charge: "If the jury believe from the evidence that the defendant killed Pogue under duress, under compulsion from a necessity, under threats of immediate impending peril to his own life, such as to take away the free agency of the defendant, then he is not guilty." The court refused this charge, and the refusal is assigned as error. This brings up for consideration the question, what is the law when one person, under compulsion or fear of great bodily harm to himself, takes the life of an innocent person; and what is his duty when placed under such circumstances?

* The fact that defendant had been in the employment of Burkhalter is no excuse. The command of a superior to an inferior, of a parent to a child, of a master to a servant, or of a principal to his agent, will not justify a criminal act done in pursuance of such command: 1 Bishop on Criminal Law, sec. 355; *Reese v. State*, 73 Ala. 18; 4 Blackstone's Commentaries, sec. 27.

In a learned discussion of the question, to be found in 1 Leading Criminal Cases, page 81, and note on page 85, by Bennett and Heard, it is declared that "for certain crimes the wife is responsible, although committed under the compulsion of her husband. Such are murder," etc. To the same effect is the text in 14 American and English Encyclopedia of Law, page 649; and this court gave sanction to this rule in *Bibb v. State*, 94 Ala. 31; 33 Am. St. Rep. 88. In Ohio a contrary rule prevails in regard to the wife: *Davis v. State*, 15 Ohio, 72; 45 Am. Dec. 559. In Arkansas there is a statute specially exempting married women from liability when "acting under the threats, commands, or coercion of their husbands," but it was held under this act there was no presumption in favor of the wife accused of murder, and that it was incumbent on her to show that the crime was done under the influence of such coercion, threats, or commands": *Edwards v. State*, 27 Ark. 493, reported in 1 Criminal Law by Green, page 741.

In the case of *Beal v. State*, 72 Ga. 200, and also in the case of *People v. Miller*, 66 Cal. 468, the question arose upon the

sufficiency of the testimony of a witness to authorize a conviction for a felony, it being contended that the witness was an accomplice. In both cases the witness was under fourteen years of age. It was held that if the witness acted under threats and compulsion he was not an accomplice. The defendants were convicted in both cases.

In the case of *Rex v. Crutchley*, 5 Car. & P. 133, the defendant was indicted for breaking a threshing-machine. The defendant was allowed to prove that he was compelled by a mob to go with them and compelled to hammer the threshing-machine, and was also permitted to prove that he ran away at the first opportunity.

In 1 Hawkins' Pleas of the Crown, chapter 28, section 26, it is said: "The killing of an innocent person in defense of a man's self is said to be justifiable in some special cases, as if two be shipwrecked together and one of them get upon a plank to save himself, and the other also, having no other means to save his life, get upon the same plank, and finding it not able to support them both, thrusts the other [•] from it, whereby he is drowned, it seems that he who thus preserved his own life at the expense of that other may justify the fact by the inevitable necessity of the case."

In 1 Hale's Pleas of the Crown, chapter 8, section 50, it is said: "There is to be observed a difference between the times of war, or public insurrection or rebellion, when a person is under so great a power that he cannot resist or avoid, the law in some cases allows an impunity for parties compelled, or drawn by fear of death, to do some acts in themselves capital, which admit no excuse in time of peace. . . . Now as to times of peace: If a man be menaced with death, unless he will commit an act of treason, murder, or robbery, the fear of death doth not excuse him if he commit the act; for the law hath provided a sufficient remedy against such fears by applying himself to the court and officers of justice for a writ or precept *de securitate pacis*. Again, if a man be desperately assaulted and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person, the present fear of actual force will not acquit him of the crime and punishment of murder, if he commit the act; for he ought rather to die himself than kill an innocent; but if he cannot otherwise save his own life, the law permits him in his own defense to kill his assailant."

4 Blackstone's Commentaries, section 30, declares the law

to be: "Though a man be violently assaulted, and has not other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent."

In 4 Stephens' Commentaries, book 6, chapter 2, pages 83, 84, the same rule is declared to be the law.

In East's Crown Law the same general principles are declared as to cases of treason and rebellion, etc. But on page 294, after referring to the case of two persons being shipwrecked and getting on the same plank, proceeds as follows: "Yet, according to Lord Hale, a man cannot even excuse the killing of another who is innocent, under a threat, however urgent, of losing his own life unless he comply. But if the commission of treason may be extenuated by the fear of present death, and while the party is under actual compulsion, there seems no reason why this offense may not be mitigated upon the like consideration of human infirmity. But if the party might, as Lord Hale, in one place, supposes, have recourse to the law for his protection against such threats, it will certainly be no excuse for committing murder."

¹⁶ In 1 Russell on Crimes, section 699, it is stated as follows: "The person committing the crime must be a free agent, and not subject to actual force at the time the act is done; thus, if A by force take the arm of B, in which is a weapon, and therewith kill C, A is guilty of murder, but not B. But if it be only a moral force put upon B, as by threatening him with duress or imprisonment, or even by an assault to the peril of his life in order to compel him to kill C, it is no legal excuse."

In the case of *Regina v. Tyler*, 8 Car. & P. 618, Lord Denham, C. J., declares the law as follows: "With regard to the argument, you have heard that these prisoners were induced to join Thom, and to continue with him from a fear of personal violence to themselves, I am bound to tell you that where parties, for such reason, are induced to join a mischievous man, it is not their fear of violence to themselves which can excuse their conduct to others. . . . The law is that no man, from a fear of consequences to himself, has a right to make himself a party committing mischief on mankind."

In the case of *Respublica v. McCarty*, 2 Dall. 86, when the defendant was on trial for high treason, the court uses this language: "It must be remembered that in the eye of the

law nothing will excuse the act of joining the enemy but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage on property."

The same rule in regard to persons charged with treason as that stated in Hale's Pleas of the Crown is declared in 1 Hawkins' Pleas of the Crown, chapter 17, section 28, and note, and both authors hold that "the question of the practicability of escape is to be considered, and that if the person thus acting under compulsion continued in the treasonable acts longer than was necessary, the defense '*pro timore mortis*' will not be available."

This principle finds further support in the case of *United States v. Greiner*, tried for treason, reported in 4 Phila. 396, in the following language: "The only force which excuses on the grounds of compulsion is force upon the person and present fear of death, which force and fear must continue during all the time of military service, and that it is incumbent in such a case upon him who makes force his defense to show an actual force, and that he quitted the service as soon as he could."

1 Wharton's Criminal Law, section 94, under the head of Persons Under Compulsion, says: "Compulsion may be viewed in two aspects: 1. When the immediate agent is physically ²¹ forced to do the injury, as when his hand is seized by a person of superior strength, and is used against his will to strike a blow, in which case no guilt attaches to the person so coerced; 2. When the force applied is that of authority or fear. Thus, when a person not intending wrong is swept along by a party of persons whom he cannot resist he is not responsible if he is compelled to do wrong by threats on the part of the offenders instantly to kill him, or to do him grievous bodily harm if he refuses; but threats of future injury, or the command of any one not the husband of the offender, do not excuse any offense. Thus, it is a defense to an indictment for treason that the defendant was acting in obedience to a *de facto* government, or to such concurring and overbearing sense of the community in which he resided as to imperil his life in case of dissent." In section 1803 a of the same author (Wharton), it is said: "No matter what may be the shape compulsion takes, if it affects the person, and he yielded to it *bona fide*, it is a legitimate defense."

We have examined the cases cited by Mr. Wharton to sustain the text, and find them to be cases of treason, or fear

from the party slain, and in none of them is there a rule different from that declared in the common-law authorities cited by us.

Bishop on Criminal Law, sections 346, 347, 348, treats of the rules of law applicable to acts done under necessity and compulsion. It is here declared: "That always an act done from compulsion and necessity is not a crime. To this proposition the law knows no exception. Whatever it is necessary for a man to do to save his life is, in general, to be considered as compelled."

The cases cited to these propositions show the facts to be different from those under consideration. The case referred in *Reniger v. Fogossa*, 1 Plow. 19, was where the defendant had thrown overboard a part of his cargo of green wood, during a severe tempest, to save his vessel and the remainder of his cargo. The other, *Queen v. Bamber*, 5 Q. B. 279, was for the failure to keep up a highway, which the encroachments of the sea had made impossible; and that of *Tate v. State*, 5 Blackf. 73, was also that of a supervisor of a public highway, and the others were cases of treason, to which reference has been made. In section 348 the author cites the rule laid down by Russell, and also of Lord Denman, and in 1 East Pleas of the Crown, to which reference has already been made. In section 845 the same author uses the following language: "The cases in which a man is clearly justified in taking another's life to save his own are when the ¹² other has voluntarily placed himself in the wrong. And *probably*, as we have seen, it is never the right of one to deprive an innocent third person of life for the preservation of his own. There are, it *would seem*, circumstances in which one is bound even to die for another." Italics are ours—emphasized to call attention to the fact, that the author is careful to content himself more with a reference to the authorities which declare these principles of law than an adoption of them as his own.

The authorities seem to be conclusive that, at common law, no man can excuse himself, under the plea of necessity or compulsion, for taking the life of an innocent person.

Our statute has divided murder into two degrees, and affixed the punishment for each degree, but in no respect has added to, or taken away, any of the ingredients of murder as known at common law: *Mitchell v. State*, 60 Ala. 26; *Fields v. State*, 52 Ala. 352.

That persons have exposed themselves to imminent peril and death for their fellow-man, and that there are instances, where innocent persons have submitted to murderous assaults and death rather than take life is well established, but such self-sacrifices emanated from other motives than the fear of legal punishment. That the fear of punishment by imprisonment or death at some future day by due process of law can operate with greater force to restrain or deter from its violation, than the fear of immediate death, unlawfully inflicted, is hardly reconcilable with our knowledge and experience with that class of mankind, who are controlled by no other higher principle than fear of the law. Be this as it may, there are other principles of law undoubtedly applicable to the facts of this case, and which we think cannot be ignored.

The evidence of the defendant himself shows that he went to Burkhalter's house about nine o'clock of the night of the killing, and there met Burkhalter and Leith, and that it was there, and at that time, they told him he must kill Pogue. The evidence is not clear as to how far it was from Burkhalter's to Pogue's dwelling, where the crime was perpetrated; but it was sufficient to show that there was some considerable distance between the places, and he testifies as they went to Pogue's, they went by the mill and got the axe, with which he killed him. Under every principle of law, it was the duty of the defendant to have escaped from Burkhalter and Leith, after being informed of their intention to compel him to take the life of Pogue, as much so as it is the duty of one who had been compelled to take up ¹³ arms against his own government, if he can do so with reasonable safety to himself; or of one assailed to retreat, before taking the life of his assailant. Although it may have been true, that at the time he struck the fatal blow, that he had reason to believe he would be killed by Burkhalter and Leith, unless he killed Pogue, yet, if he had the opportunity, if it was practicable, after being informed at Burkhalter's house of their intention, he could have made his escape from them with reasonable safety, and he failed to do so, but remained with them until the time of the killing, the immediate necessity or compulsion under which he acted at that time would be no excuse to him. As to whether escape was practicable to defendant, as we have stated, was a question of fact for the jury. The charge, numbered 1 and refused by the court, ignored this principle of law and phase of evidence, and demanded an acquittal of de-

fendant, if at the time of the killing the compulsion and coercion operated upon the defendant, and forced him to the commission of the act, notwithstanding he might have avoided the necessity by escape before that time. We do not hesitate to say he would have been justifiable in taking the life of Burkhalter and Leith, if there had been no other way open to enable him to avoid the necessity of taking the life of an innocent man. The charge requested was erroneous and misleading, in the respect that it ignored the law and evidence in these respects.

The second charge requested was properly refused. We suppose the principle asserted is exactly the contrary of that intended. By the use and position of the negatives the charge is made to assert that unless there was a present impending necessity to strike there could be no murder.

There is no error in the record.

It appearing that the day appointed for the execution of the sentence has passed, it is considered and ordered that Friday, the tenth day of March next (1893), be and is hereby appointed and specified for the execution of the sentence of the law pronounced by the trial court, and the sheriff or his deputy, or the officer acting in his place, must execute the sentence.

Affirmed.

CRIMINAL LAW—CRIME COMMITTED UNDER COMPELSION.—For a discussion of the liability of a wife for crimes committed under the actual or presumed coercion of her husband, see the monographic note to *Bibb v. State*, 33 Am. St. Rep. 89-96.

TRIAL—VENIRE OF JURORS.—INCOMPETENCY OF SOME OF THOSE SUMMONED NOT A GROUND FOR QUASHING: See *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96.

HODGE v. STATE.

[97 ALABAMA, 87.]

MURDER—EVIDENCE—COLLATERAL FACTS.—On a trial for murder rags and paper blackened, as if by powder, found near the place where the deceased was killed by gunshot wounds, are admissible in evidence against the accused, when it appears that one barrel of a double-barrel shotgun belonging to the latter, and found concealed in his house shortly after his arrest, was empty, while the other contained rags and paper similar to those admitted in evidence.

CONFESSIONS—ADMISSIBILITY.—A voluntary confession or admission by a person accused of murder, made to officers, while in jail, that a gun found at his house shortly after his arrest is his property is admissible in evidence against him.

CRIMINAL EVIDENCE—MARKS OR FOOTPRINTS.—Any traces or marks found at or near the scene of a crime about the time of its commission, indicative of the presence or proximity of the accused, are admissible in evidence as facts tending to connect him with its commission. The character of footprints found where the crime is discovered, leading to or from the place of the crime, and their correspondence with the feet of the accused, or with shoes worn by or found in his possession, are also admissible in evidence to identify him as the guilty party.

EVIDENCE—OPINION AS TO FOOTPRINTS.—A witness in a criminal case is allowed to state that he measured tracks found at the place where a crime was committed, and compared them with tracks made by the accused the next day, and that they corresponded; but he is not allowed to say that a particular shoe which he found on the foot of the accused would make such a track, nor that in his judgment it was his track, nor to give his opinion on the subject at all. He must state the facts of identification, and it is for the jury to find from the facts deposed to whether the tracks were made by the accused or not.

MURDER—EVIDENCE OF MOTIVE.—On a trial for murder, evidence that an indictment for another crime is pending against the accused, and that the deceased was a prosecuting witness in that case, is admissible, when offered in connection with threats by the accused to take the life of the deceased, because she was a witness against him in that case, to show motive for the perpetration of the crime.

MURDER—FAILURE OF ACCUSED TO DENY GUILT—EFFECT OF.—The failure of an accused, when testifying as a witness, to deny that he fired the fatal shot, is not an admission of guilt, but is only a circumstance, the weight of which is for the jury in the light of all the evidence.

REASONABLE DOUBT Is doubt for which a good reason arising from the evidence can be given.

J. W. Posey, for the appellant.

W. L. Martin, attorney general, for the state.

38 HARALSON, J. 1. Rose Stanback was shot and killed in Brewton, by some unknown person, about eight or nine o'clock, on a Sunday evening, in February, 1892. Some buck-shot were found to have entered a plank in a house near where she was found, and about twenty-five steps away were afterwards discovered tracks of a person who wore shoes, and between the tracks and house were found "some colored calico scraps or rags, blackened as if shot with powder, two in number, one having several holes through it, and some soft, thin paper." These were produced and offered in evidence.

39 The defendant objected to the evidence, but the court admitted it, and he excepted.

By itself, and disconnected with something else, to make it relevant, this evidence did not tend to show that defendant, any more than any other person, did the shooting. We in-

fer, however, that it was offered and admitted, with the expectation of its being made relevant by other evidence to be offered, in the further progress of the trial, since we find such evidence was offered as follows:

The evidence shows that the sheriff and others, several days after the defendant had been arrested and confined in jail, went to the house of the defendant, and looking through, found a double-barrel shotgun, put in a place as if to conceal it, with one barrel empty, and the other loaded; that they drew the load, and found it contained buckshot and some dark calico rags and tissue paper wadding, similar in appearance to the rags and paper picked up near the place of the killing, which had been admitted in evidence, and these, also, were offered and introduced in evidence, against defendant's objection and exception.

This evidence was clearly competent, and rendered that about the other rags and paper before introduced also relevant, as tending to connect the defendant with the shooting: *Mattison v. State*, 55 Ala. 224; *Scroggins v. State*, at present term: *Commonwealth v. Webster*, 5 Cush. 295; 52 Am. Dec. 727.

And each of these criminative circumstances becomes more pertinent, when it was afterwards shown that the marshal of the town, sheriff, and the clerk of the court, each known to the defendant, went together to the jail, taking with them the gun which had been found in defendant's house, and asked him if it was his gun, and he said it was.

The witnesses by whom this admission was shown testified that they made no threats nor offered any inducements to defendants to procure said confession, and that it was voluntary. The defendant's counsel objected to this evidence on the ground that it was not a voluntary confession, but it was admitted, and he excepted. There was no error in its admission: 3 Brickell's Digest, p. 285, secs. 552, 553.

2. Any traces or marks at or near the scene of the crime, about the time of its commission, indicative of the presence or proximity of the accused, are always admissible as facts tending to connect the defendant with its commission. The character of footprints, found where the crime is discovered, leading to or from the place of the crime, and their correspondence with the feet of the accused, or with shoes worn by him, or found in his possession, we have held are admissible⁴⁰ in evidence to identify him as the guilty agent: *Young v. State*, 68 Ala. 569.

A witness may be allowed to state that he measured the tracks at the place where the crime was committed, and compared them with tracks made by defendant the next day, and they corresponded; but, he will not be allowed to say that a particular shoe which he saw on defendant's foot would make such a track, nor that "in his judgment it was defendant's track," nor to give his opinion on the subject at all. He must state the facts of identification, and it is for the jury to find, from the facts deposed to, whether they were defendant's tracks or not: *Busby v. State*, 77 Ala. 66; *Riley v. State*, 88 Ala. 193.

It was erroneous for the court to allow the witnesses to express their opinions, "that the tracks seen at or near the place of the killing were the same, and made by the same persons, as the others they occasionally saw elsewhere"; and for the sheriff to testify, that the track or impression made by the shoe taken by him off of defendant's foot; "was the same as the other tracks made and seen several days previous, near the place of the killing and other places in the town of Brewton."

3. The court committed no error in allowing the state to introduce evidence of the pendency, in that court, of another indictment against defendant, for another crime, alleged to have been committed by him, in which deceased was a witness for the state, against him, in connection with the evidence of threats made by defendant, to take the life of the deceased, because she was a witness against him, in said cause. This evidence tended to show motive, on the part of the defendant, to get rid of deceased: *Marler v. State*, 67 Ala. 56; 42 Am. Rep. 95; 68 Ala. 580; *Duncan v. State*, 88 Ala. 34.

4. Defendant, testifying in his own behalf, failed to state or deny, that he did or did not do the shooting that killed deceased, although he was asked directly, if he did do it. The solicitor for the state argued to the jury, that this failure of defendant to deny in his testimony, that he did the shooting was an admission that he did it. To this argument the attorney for the defendant objected, on the ground, that it was no admission against him, and moved to exclude it, but the court overruled the objection and motion, and defendant excepted.

The bill of exception states, in this immediate connection, that the court, then and there, and in its general charge instructed the jury, that the failure of defendant to answer

that question, was not an admission or confession ⁴¹ that he did the shooting, but that it was a circumstance in evidence in the case, which might be considered by them; and the state's solicitor was not allowed to argue it as a confession or admission, but only as a circumstance, the weight of which was dependent on the circumstances, and it was for the jury, in the light of all the evidence, to determine what weight they would give to it, if any.

There was no error in this ruling, of which the defendant can complain: *Clarke v. State*, 87 Ala. 71; *Cotton v. State*, 87 Ala. 103.

5. The court was requested, by defendant, but refused, to charge the jury: "That a reasonable doubt is defined to be a doubt for which a reason could be given," and defendant excepted.

This charge was held to be good in *Cohen v. State*, 50 Ala. 108, and held to be incorrect in *Ray v. State*, 50 Ala. 104.

In *People v. Guidici*, 100 N. Y. 509, the court approved a charge on reasonable doubt, which defined it as "a doubt for which some good reason, arising from the evidence, may be given"; and in *State v. Jefferson*, 43 La. Ann. 995, the court sustained a charge, that reasonable doubt was "a serious, sensible doubt, such as you could give a good reason for": 3 Greenleaf on Evidence, 14th ed., sec. 29, note.

We adhere to the rulings in *Cohen v. State*, 50 Ala. 108, and hold, that the court erred in not giving this charge.

For the errors pointed out, the judgment of the court is reversed and the cause remanded.

CONFESSIONS—WHEN ADMISSIBLE.—A voluntary confession of an accused respecting the act he committed is admissible in evidence: *Carroll v. State*, 23 Ala. 28; 58 Am. Dec. 282; *Coffee v. State*, 25 Fla. 501; 23 Am. St. Rep. 525, and note; *Carr v. State*, 24 Tex. App. 562; 5 Am. St. Rep. 905, and note; *Hendrickson v. People*, 10 N. Y. 13; 61 Am. Dec. 721, and note; *Woolfolk v. State*, 85 Ga. 69; *Commonwealth v. Clarke*, 130 Pa. St. 641; *People v. Cassidy*, 133 N. Y. 612; *Lyons v. People*, 137 Ill. 602; *Neeley v. State*, 27 Tex. App. 324. See, also, the note to *Green v. State*, 30 Am. St. Rep. 169, and the extended notes to *Daniels v. State*, 6 Am. St. Rep. 250; *Nolen v. State*, 46 Am. Rep. 253, and *Heldt v. State*, 57 Am. Rep. 839.

EVIDENCE—OPINIONS AS.—A conclusion or supposition of a witness is not evidence against another person: *People v. Sharp*, 107 N. Y. 427; 1 Am. St. Rep. 851; *Tillery v. State*, 24 Tex. App. 251; 5 Am. St. Rep. 882, and note. Mere expressions of opinion by witnesses are inadmissible in evidence: *Brinkley v. State*, 89 Ala. 34; 18 Am. St. Rep. 87; *Moses v. State*, 88 Ala. 78; 16 Am. St. Rep. 21; *Hawkins v. State*, 25 Ga. 207; 71 Am. Dec. 166, and note; *Keener v. State*, 18 Ga. 194; 63 Am. Dec. 269; *Zube v. Weber*, 67 Mich.

53; *Jones v. Portland*, 88 Mich. 598; *East Tennessee etc. Ry. Co. v. Johnson*, 85 Ga. 497; *Taylor v. Baltimore etc. Ry. Co.*, 33 W. Va. 39; *Williams v. Clark*, 47 Minn. 53; *Moore v. Kennedy*, 81 Tex. 144; *Graves v. Campbell*, 74 Tex. 576; *King v. Missouri Pac. Ry. Co.*, 98 Mo. 235. See, also, the note to *Reid v. Ladue*, 11 Am. St. Rep. 465, and the extended notes to *Commonwealth v. Sturtivant*, 19 Am. Rep. 410, and *Baltimore etc. Turnpike Co. v. Cassell*, 59 Am. Rep. 176.

TRIAL—REASONABLE DOUBT—WHAT IS.—A reasonable doubt is one arising from a candid and impartial investigation of all the evidence, such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause: *Gannon v. People*, 127 Ill. 507; 11 Am. St. Rep. 147, and note; *Wacaser v. People*, 134 Ill. 438; 23 Am. St. Rep. 683, and note; *Commonwealth v. Miller*, 139 Pa. St. 77; 23 Am. St. Rep. 170, and note. See, further, *Ross v. State*, 92 Ala. 28; 25 Am. St. Rep. 20, and note; and the notes to *State v. Hickam*, 6 Am. St. Rep. 61; *Plake v. State*, 16 Am. St. Rep. 410; *Ripley v. Miller*, 62 Am. Dec. 183, and *Monroe v. State*, 76 Am. Dec. 66.

HOMICIDE—EVIDENCE.—COLLATERAL FACTS: See *Commonwealth v. Webster*, 5 Cush. 295; 52 Am. Dec. 711, and especially note; *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320, and *State v. Stair*, 87 Mo. 268; 56 Am. Rep. 449.

CRIMINAL LAW—EVIDENCE—FOOTPRINTS.—A witness may testify that he measured the foot-tracks found at the place where a crime was committed, that he also examined the shoe of the defendant immediately after the crime and found that it fitted exactly: *McLain v. State*, 30 Tex. App. 482; 28 Am. St. Rep. 934; *Clark v. State*, 28 Tex. App. 189; 19 Am. St. Rep. 817. On a trial for murder it was not error to permit the prosecution to prove that the examining magistrate had compelled the prisoner to make his footprints in an ash-heap and that they corresponded with footprints found at the scene of the crime: *Walker v. State*, 7 Tex. Ct. App. 245; 32 Am. Rep. 595. See, also, *State v. Saunders*, 68 Mo. 202; 30 Am. Rep. 782.

HOMICIDE.—EVIDENCE OF MOTIVE: See *Bonnard v. State*, 25 Tex. App. 173; 8 Am. St. Rep. 431, and note; *Hendrickson v. People*, 10 N. Y. 13; 61 Am. Dec. 721, and *State v. Watkins*, 9 Conn. 47; 21 Am. Dec. 712.

JONES v. STATE.

[97 ALABAMA, 77.]

ACQUITTAL—THE DISCHARGE OF A JURY in a criminal case, without the consent of the accused, and not called for by some pressing necessity, operates as an acquittal.

ACQUITTAL BY UNAUTHORIZED DISCHARGE OF JURY.—If a jury in a criminal case returns a verdict to the clerk of the court after it has adjourned for the day, without the consent of the accused, and thereupon disbands and goes home, and the verdict is entered the next day, this operates as an acquittal.

W. L. Martin, attorney general, for the state.

⁷⁷ HARALSON, J. The discharge of a jury in a criminal case, without the consent of the defendant, not called for by some pressing necessity, as is held by the uniform current of au-

thorities, operates an acquittal, and bars a future trial: 11 Am. & Eng. Ency. of Law, 950.

The delivery and recording of a verdict are essential to its validity, because it is not perfected until recorded: 4 Am. & Eng. Ency. of Law, 881.

The jury, in this case, returned their verdict at night, after the court had adjourned for the day. It was received by the clerk and read, and the jury disbanded, and went to their homes. The record does not show that the prisoner was present, but it does show that this proceeding was had, without any instructions from the court, and without the consent or sanction of the defendant or of his attorney. The next day the judge, without more, entered on his docket the verdict which had been returned and handed to the clerk the night before.

The discharge of the jury under these circumstances was ⁷⁸ unauthorized, and operated as an acquittal of the defendant: *Foster v. State*, 88 Ala. 184.

The judgment of the court below is reversed, and it is ordered that the prisoner be discharged.

TRIAL—ACQUITTAL BY DISCHARGE OF JURY.—The discharge of the jury in a criminal case, without legal justification for the act, entitles the prisoner to a discharge, as if acquitted: *Mahala v. State*, 10 Yerg. 532; 31 Am. Dec. 591, and note; *Williams v. Commonwealth*, 2 Gratt. 567; 44 Am. Dec. 403; *McFadden v. Commonwealth*, 23 Pa. St. 12; 62 Am. Dec. 308, and note; *Commonwealth v. Cook*, 6 Serg. & R. 577; 9 Am. Dec. 465, and note; *State v. Ward*, 48 Ark. 36; 8 Am. St. Rep. 213, and note; *Wright v. State*, 5 Ind. 290; 61 Am. Dec. 90, and note; *O'Brian v. Commonwealth*, 9 Bush, 333; 15 Am. Rep. 715; *Rudder v. State*, 29 Tex. App. 262.

STATE v. WEBB.

[97 ALABAMA, 111.]

CORPORATIONS.—ACTION TO ANNUL THE CHARTER of a private corporation may be brought in the name of the state, under the Alabama statute, on the information of any person giving security for costs, without first obtaining an order from any court.

CORPORATIONS.—ACTION TO ANNUL CHARTER—PARTIES—SUFFICIENCY OF INFORMATION.—An information in an action to annul the charter of a private corporation, which names certain stockholders who compose its governing body, and who fairly represent the other stockholders, who the information alleges are too numerous to be brought upon the record, that some are unknown and the remainder nonresidents, is not open to demurrer on the ground that all of the stockholders are not made parties.

CORPORATIONS—ACTION TO ANNUL CHARTER—PARTIES.—An information in an action to annul the charter of a private corporation, alleging that certain stockholders named, who compose its governing body, together with their associates, are usurping the powers of a corporation, makes the stockholders specially named the only parties defendant, and is not subject to demurrer on the ground that it seeks to make other stockholders parties defendant, by describing them as associates, without naming or otherwise designating them.

CORPORATIONS—ACTION TO ANNUL CHARTER—WAIVER OF RIGHT.—If allegations in an information brought by a private person in the name of the state to annul the charter of a private corporation, charging fraudulent preliminary steps in its organization, and the concealment of such fraud by its stockholders from the state, are true, such stockholders can acquire no advantage from such fraud, and they cannot successfully claim, on demurrer to the information, that the state has waived its right to proceed against them, nor that by its failure to proceed against them it has admitted or acquiesced in their corporate existence.

CORPORATIONS—CREATION OF FRAUD.—Any attempt to acquire corporate life and functions by a pretentious or evasive compliance with the statute, as to issue of, or payment for, stock, no matter what the papers of the corporation say upon their face, must be adjudged abortive as a fraud upon the law. The conditions to organization prescribed by the statute are prerequisite to a rightful or lawful corporate organization, and it is only when these things are done that the subscribers become a body corporate.

CORPORATIONS—ACTION TO RESTRAIN INDIVIDUALS FROM ACTING AS CORPORATION—PARTIES.—An action against individual stockholders to restrain them from fraudulently usurping the powers of a corporation is properly brought against them individually, and the corporation, whether *de jure* or *de facto*, is not a proper nor necessary party defendant.

Cabaniss and Weakley, and Charles A. Senn, for the appellant.

Webb and Tillman, for the appellees.

¹¹² HARALSON, J. The attempt to incorporate the company, the validity of whose charter is questioned in this case, in that the defendants are charged with having usurped the franchise of being a corporation, proceeded under sections 1803-1807 ¹¹³ of the code of 1876, as amended by acts of 1882, 1883, pp. 5 and 40.

In these statutes it is provided that two or more persons, desiring to form themselves into a private corporation, for carrying on any manufacturing, mining, immigration, or industrial business in this state, may file in the probate court of the county, in which it is proposed that the company shall have its principal place of business, a written declaration, signed by them, setting forth the names and residences of the

petitioners, the name of the proposed corporation, the amount of the capital stock, and the number of shares into which it is to be divided, and other matters as prescribed in section 1803.

Thereupon the probate judge must issue a commission to the petitioners, or to any two or more of them, to open books of subscription and proceed with the business of procuring the subscription of the capital stock, as provided in section 1804.

All subscriptions are required to be made payable in money, or in labor or property, at its money value: Sec. 1805. Section 1806 provides, that when not less than fifty per cent of the proposed capital stock has been subscribed, by *bona fide* subscribers, the board of corporators shall call the subscribers together, and they shall proceed to organize the corporation, by electing from themselves a board of directors of not less than three nor more than nine members, who, in turn, shall elect from this number a president and secretary.

It is then provided, in section 1807, as amended, that upon the completion of the organization, and the payment to the treasurer of the company, or to some officer designated for that purpose, in cash, at least twenty per cent of the capital subscribed, payable in money, and the payment of the remainder of the capital so subscribed for, payable in money, being secured to be paid, . . . and also the delivery to such officers of at least twenty per cent of the property subscribed, . . . the board of corporators shall, in writing, over their own signatures, certify the same to the judge of probate, who shall issue to them a certificate, that they have been fully organized according to law, under the name and for the purposes indicated in their written declaration, and are fully authorized to commence business under their charter.

The code of 1886 provides that "an action may be brought in the name of the state, on the information of any person, for the purpose of vacating the charter or annulling ¹¹⁴ the existence of any corporation, other than municipal," for five causes specified in section 3167.

And, again, that "an action may be brought in the name of the state against the party offending, in the following cases"—naming three causes of offense, the third and last of which is, "when any association, or number of persons, act within this state as a corporation, without being duly incorporated": Section 3170.

Under either of these sections—to annul a charter, or to

exclude persons from exercising corporate franchises, when they have not been duly incorporated—the judge of the circuit court may order the action brought—under section 3167, whenever he has reason to believe that any one of the acts or omissions specified in that section can be proved, and it is necessary for the public good; or, under section 3170, when he believes that any one of the acts specified in that section can be proved, and it is necessary for the public good; or, under either one of them, for the causes specified in them, “an action may be brought on the information of any person giving security for the costs of the action, to be approved by the clerk,” the provision being the same in both sections, for the action by private persons, sections 3168 and 3171.

The information in this case was filed without the direction of the judge of the circuit court, and was instituted by Hercules Sanche, in the name of the state, on his relation, having given security for costs, approved by the clerk of the circuit court. It charged, in substance, that the defendants and their associates were acting, and claimed to act, as a corporation, under the name of “The Electro Libration Company,” by virtue of certain proceedings in the probate office of Jefferson county, described in the information, which were had and taken under the provisions of the code of 1876, first above referred to, for the purpose of incorporating said company, but which are alleged to have been merely colorable and abortive because: 1. Notwithstanding the report of the commissioners, that ten thousand shares of one hundred dollars each of the capital stock of the company had been duly and regularly and in good faith subscribed for, and that the subscribers had paid the entire subscription of one million dollars to the capital stock of said corporation, paid by causing to be conveyed to it the property which they had subscribed for said stock, yet, as a matter of fact, not fifty per cent of the proposed capital stock of one million dollars, nor any appreciable part thereof, had been subscribed by *bona fide* subscribers, nor had the subscribers agreed to pay money, or money’s worth, on account of their said subscriptions, nor was it ¹¹⁵ understood or intended that they should pay or transfer to the company money or labor or property at its actual value in payment of the subscriptions, but the promoters and organizers of said proposed corporation entered into a scheme, in violation of the statutes, under which they purport to organize, whereas, in point of fact, the subscribers undertook to

transfer, and did transfer, to said company, in full payment of their subscription of one million dollars, only the possibility of obtaining a patent, which possibility had no commercial value whatever, and for which they had agreed to pay only ten thousand dollars, of which only five thousand dollars had then been paid, no patent having been obtained; 2. It is averred that not twenty per cent of the capital stock of said corporation, which section 106 of code, as amended, required should be paid, nor any appreciable sum of that amount, had, at the time of making said report, or has ever been, paid in cash, to the treasurer of said pretended corporation, nor to any officer designated for that purpose, nor was it ever intended or understood that it should be paid, in the equivalent of cash, nor in property of the value of twenty per cent, nor in labor of that value, but said stock was fictitiously issued.

The prayer of the petition followed section 3178 of the code, that the defendants, who were the so-called directors of said pretended corporation, residing in Alabama, and their associates, be excluded and ousted from the said franchise of acting as a corporation, and pay the cost of the proceeding.

The defendants demurred to the information, assigning numerous grounds. One of these grounds was, that the said Electro Libration Company had not been made a party to the suit. The court sustained the demurrer on this ground—as it would seem from the opinion on file—giving the plaintiff the privilege of amending, which he declined to do, and judgment was rendered on the demurrer, in favor of defendants. Let us consider these several grounds of demurrer.

1. It was unnecessary for the plaintiff, as is urged as ground for demurrer, to obtain the direction of the circuit judge, before the institution of this suit, whether it be held to have been brought under section 3167 or section 3170 of the code. Under either, the judge may direct the bringing of an action, or, it may be brought on the information of any person, by his giving security for the costs of the action. The judge acts independently of any person, in directing an action under either section, and any person who desires to bring an action under either may do so, without consulting the judge, and getting his direction. The statute is so plain to ¹¹⁶ this effect, as to defy argument to make it plainer: *Chesshire v. People*, 116 Ill. 493.

2. It is objected that the information shows, that there are

other stockholders, besides the defendants, who are not, and who ought to have been made, parties defendant.

But this ground is not well taken, since when the parties are very numerous, or there are many in the same interest who cannot be easily ascertained; or where the question is one of common interest, and one or more may sue or defend for the whole; or where the parties form a voluntary association, and those made defendants may be fairly presumed to represent the interests of all, the action may proceed against any number, in such cases, less than the whole. This information alleges that the defendant's associates are too numerous to be brought upon the record, some are unknown and the remainder are nonresidents. It would seem that the defendants, the chosen officers and directors of the alleged corporation, its governing body, would fairly represent the other stockholders: *Story's Equity Pleading*, secs. 97, 99; *Ewing v. State*, 81 Tex. 172; *People v. Carpenter*, 24 N. Y. 86; *Chesshire v. People*, 116 Ill. 493.

3. The objection, that the plaintiff seeks to make others parties defendant, by describing them as associates, without giving their names or otherwise designating them, is predicated on an erroneous assumption, that plaintiff seeks to make the persons referred to parties defendant. The allegation is, that the defendants, "together with their associates, in what is called the Electro Libration Co. . . . are usurping the privilege and franchise of being a corporation." The information is against individuals, who are charged with usurping a franchise to be a corporation, and they are the only parties, made or sought to be made defendants.

4. There was no waiver on the part of the state of its right to bring this suit as is charged. The demurrer fails to point out in what the waiver consists, and no fact is stated in the information, which would amount to waiver, by acquiescence or otherwise. If the fraudulent acts of the defendants, as disclosed in the information, be true they can acquire no advantage which their own alleged fraudulent conduct enables them to set up. The action on the part of the state, in not having instituted legal proceedings against them, heretofore, superinduced by the fraudulent representations and concealments of the real facts by defendants, will not be treated as an omission of, or acquiescence on the part of, the state in their claim to corporate existence.

¹¹⁷ 5. It was objected, again, that the information showed

that this action was under section 3167 of the code, which authorizes an action to vacate a charter or to annul the existence of any corporation other than municipal, and there is no averment of any of those causes for which this may be done. But this ground of objection has no foundation, since the information shows plainly enough on its face that it is brought under section 3170 of the code. To bring an action under the first named of these sections, the proceedings would necessarily be against the corporation admitting its existence; but the plaintiff in this action nowhere admits that said company ever had corporate existence, but the burden of his complaint is that it has no such existence, and defendants, in claiming such a right for it, are mere usurpers of corporate franchises, from which they ought to be excluded. The attorneys for defendants seem to admit that the action is under section 3170.

6. It now becomes pertinent to inquire if the proceedings had in the probate court gave this company corporate life, and in doing so we will make reference to the adjudged cases on the subject as the best exposition we can give.

The case of *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242, is in many respects like the one we consider. The defendants, thirteen in number, claimed to have acquired corporate existence under a general statute authorizing the formation of gas companies, which provided that thirteen persons may become a corporation on complying with certain prerequisites prescribed by it, similar in many respects to the statute under which these defendants sought incorporation, one of which requirements was the subscription of at least one-half of the entire capital stock, and the payment of twenty per cent thereon in cash. The court say: "The complainants deny the corporate existence of the defendants. They allege the defendants are not a corporation and never have been. It is admitted they filed articles of association and an affidavit, showing an ostensible compliance with the statute, but their compliance is charged to have been vicious and fraudulent. The complainants say that one-half of the capital stock of the projected corporation was not actually subscribed, and that twenty per centum was not paid in cash by each subscriber on his subscription before the articles were filed, but that some of the subscriptions were entirely fictitious. . . . Upon the facts admitted I do not think that this subscription can be regarded as coming up to the standard prescribed by

the statute. . . . It is designed to prevent ¹¹⁸ persons, without means and of doubtful integrity, launching great corporate enterprises wholly at the risk of others, solely to get remunerative positions or a chance to speculate on the capital of others. . . . Any attempt to acquire corporate functions by a pretentious or evasive compliance, no matter what the papers may say on their face, must be denounced as a fraud upon the law. By this law, a corporation is made self-creative, and a grant of a franchise is made to flow from the act of the grantee; the act is the grant, but to have this effect it must be what the law requires, and not a sham. . . . My conclusion is, that it is clearly shown the defendants have attempted to acquire corporate life and power by a feigned compliance with the law, and their effort must therefore be adjudged abortive.

In *Paterson v. Arnold*, 45 Pa. St. 410, the supreme court of Pennsylvania held that when a company is incorporated by act of assembly, the charter is conclusive evidence of its validity, but when the act or organization is under the general manufacturing law, the charter, though binding on its members, covers no fraud that may have been used in forming it; that the omission of stockholders to pay their stock as required by law is a violation of the law by which the charter was procured, and it is no shield against creditors.

The Indiana court on appeal, in an action of *quo warranto*, brought under a statute similar to ours against individuals, challenging their right to act as a railroad corporation attempted to be organized under the general law, say: "Merely simulated subscriptions made by persons who are neither actually nor apparently able to pay the amount subscribed, cannot answer the purpose of the statute. . . . They are an attempt to acquire corporate functions, not by compliance with law, but by a disingenuous evasion of it": *Holman v. State*, 105 Ind. 569.

Our own court, in line with these decisions, in an adjudication on a similar incorporation statute, held that the conditions to organization, as laid down in the statute, are prerequisite to rightful, lawful organization, and that it is only when these things are done that the subscribers become a body corporate, with the powers conferred by the laws on private corporations: *Central etc. Assn. v. Alabama Gold Life Ins. Co.*, 70 Ala. 131; *Sparks v. Woodstock Iron etc. Co.*, 87 Ala. 294.

Section 6 of article 14 of the constitution of the state provides, "That no corporation shall issue stock or bonds except for money, labor done, or money or property actually ¹¹⁹ received, and all fictitious increase of stock or indebtedness shall be void."

In construing this clause of the constitution we held that one purpose was to protect the public, as well as stockholders, against spurious and worthless stock, by the process of watering—in other words, from fraudulent issuing and putting on the market fictitious corporate stock, which is based on nothing valuable, as a consideration for its issue: *Williams v. Evans*, 87 Ala. 725.

7. Was the company claiming to be a corporation a necessary party to this proceeding? The language of the demurrer is, "said corporation, as a body corporate, is not made a party defendant to said suit."

The learned counsel for the defendants admits in argument that in such a proceeding as this the corporation itself, and the individuals, cannot be joined as defendants; that when the action is under section 3170 of the code, as this one is, it must be against the parties offending, and not against them and the corporation jointly, and when the individuals simply act as agents of the corporation *de facto*—formally, if not legally, organized—the action must be against the corporation alone; or, in other words, if there has been an attempt at organization, under the statute, however imperfect and fruitless the result, the forms of the law having been complied with, the action must be against the pseudo corporation; but if there has been a naked usurpation of a franchise to be a corporation, without any pretext at organization, then, and only then, must the action be against the individual usurpers.

In our research, aided by the industry of counsel, we have found but one case which seems to support this suggestion of defendant's counsel, that of *People v. Flint*, 64 Cal. 49, which is weakened, if not destroyed, by the later case in the same court, of *People v. Stanford*, 77 Cal. 360, where the proceeding was against the railroad corporation, as one of the defendants, with others, alleging that the individuals named as defendants, and the railroad company, were falsely claiming that there was such a corporation, and that they have unlawfully held and exercised, and claimed the right to exercise, divers powers, etc. The court say that the proceeding is an anomaly; that a corporation cannot be sued as such, and brought into

court, and the action maintained against it, on the ground that it is not a corporation. If it is intended to draw in question the franchises of the corporation, the proceedings must be against the individuals who usurp the franchise. If it is claimed that the corporation is ¹²⁰ usurping privileges and powers not belonging to it, the corporation is the proper and only party.

In Indiana they have a statute similar to ours, authorizing an action against any association or number of persons acting within the state as a corporation without being legally incorporated. The only difference between their statute and ours is, that ours uses the word "duly" instead of "legally" incorporated, and theirs also provides, like ours, for an action against the corporation for forfeiture of its charter for acts which amount to a forfeiture or surrender.

In construing this statute the supreme court of that state held that an information against a corporation in its corporate name, charging that it has not been legally organized, and pointing out certain defects in its organization, and praying a dissolution of its franchises, was bad, not being against the individuals claiming to be a corporation, and holding that it could not be brought into court, as a corporation, to answer an allegation that it is not and never was a corporation, and that when a corporation is brought into court in its corporate name, its existence as such is admitted: *Mud Creek Draining Co. v. State*, 43 Ind. 236.

In the state of New York an action is authorized, as here, "when any association or number of persons shall act within this state as a corporation without being legally incorporated." Ours is a transcript of their law, substituting the word "duly" for "legally." In a *quo warranto* proceeding, calling on a railroad company, organized under general statutes, to show by what warrant it used certain franchises alleged to have been usurped, the court say: "If the information in this case had for its object to oust the defendants from acting as a corporation, and to test the fact of their incorporation, it should have been filed against the individuals; if the object was to effect a dissolution of the corporation, which had had an actual existence, or to oust such corporation of some franchises which it unlawfully exercised, then the information is correctly filed against the corporation. . . . When, therefore, an information is filed against a corporation, the exist-

ence of the corporation is admitted": *People v. Rensselaer etc. R. R. Co.*, 15 Wend. 114; 30 Am. Dec. 33.

In Ohio they have statutes similar to ours authorizing actions against corporations for violations of charters, misuser or forfeiture of franchise, and against any association of persons who act as a corporation without being legally incorporated; and in a proceeding against a company by its corporate name, charging a usurpation of certain corporate franchises, the supreme court of that state held that when ¹²¹ the franchise to be a corporation is drawn in question, the proceedings under the statute should be against the individuals who usurp such franchise, or who assume to act as a corporation, saying: "We are aware of no case in this country in which a body, sued as a corporation, has been ousted of a franchise to be a corporation, on the ground that it never had a legal, corporate existence; and in England, the only case appears to be that of *Rex v. Chester*, 2 Term Rep. 565, and it was a municipal, and not a trading, corporation. But, on principle, it seems to be irregular that judgment should be asked against a defendant whose very existence the plaintiff denies": *State v. Cincinnati Gaslight etc. Co.*, 18 Ohio St. 262.

In the Indiana case already referred to, *Holman v. State*, 105 Ind. 569, the court held that the information was rightly exhibited against the individuals named as defendants, requiring them to show by what authority they assumed to act as a corporation, and that in such a proceeding it might be shown the subscriptions were fraudulent, and never made in good faith, and if the action was against the corporation no such inquiry would be allowed.

In *Cheshire v. People*, 116 Ill. 493, which was an information against individuals assuming to act as directors of a corporation, whose legal existence was denied in the information, the court held that it would be impossible to make the corporation a party. The only persons, if that hypothesis be true, to be brought before the court, to test the validity of the organization of the district, are those assuming to act in the capacity of directors.

In line with the foregoing are the following decisions: *People v. Spring Valley*, 129 Ill. 169; *State v. Barron*, 57 N. H. 498; *People v. Carpenter*, 24 N. Y. 86; *State v. Coffee*, 59 Mo. 59; *State v. Commercial Bank*, 33 Miss. 474.

The text-books maintain the same doctrine. High on Extraordinary Remedies, section 661, is as follows: "Some con-

flict of authority has existed in this country as to the effect of instituting proceedings against a corporation *eo nomine*. But the weight of authority may be now regarded as sustaining the proposition that the effect of filing an information against a corporation by its corporate name, to procure a forfeiture of its charter, or to compel it to disclose by what authority it exercises its corporate franchise, is to admit the existence of the corporation. Its corporate existence cannot be afterwards controverted": 1 Dillon on Municipal Corporations, sec. 892; Angell and Ames on Corporations, sec. 756; Boon on Corporations, sec. 165.

8. It can make no difference in a proceeding of this character, whether the corporation is one *de jure* or *de facto*, as ¹²² to the results of the trial. In either case the governing power, the directors, would defend. If it be ascertained that the company has corporate existence, the action fails, and if it be found that the defendants act without being duly incorporated, a judgment of exclusion from the usurped franchise will be rendered, and the creditors and stockholders in such case have ample remedies in the courts for their protection.

And so, if the action is under section 3167, against the company only, for the purpose of vacating its charter or annulling its corporate existence, and the judgment is against the corporation, as in the case of a judgment against individual usurpers of a franchise, the circuit court would not be competent to wind up its affairs, and the creditors and stockholders would seek remedies in other actions: *State v. Atchison etc. R. R. Co.*, 24 Neb. 143; 8 Am. St. Rep. 164; *Society Perun v. Cleveland*, 43 Ohio St. 481.

It cannot be doubted, after what has been said, that the allegations of the complaint in this case, if true, are sufficient to entitle the plaintiff to his judgment as authorized by the statute, and that the demurrer to the information ought to have been overruled.

Reversed and remanded. _____

CORPORATIONS—ACTION TO DISSOLVE—BY WHOM BROUGHT.—The exercise of a corporate franchise can only be called into question by the public: *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325; 94 Am. Dec. 84; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579; 30 Am. St. Rep. 763, and note with cases collected; *Williams v. Citizens' Ry. Co.*, 130 Ind. 71; 30 Am. St. Rep. 201, and note. The validity of a corporate franchise can only be attacked at the instance of the state: *Selma etc. R. R. Co. v. Tipton*, 5 Ala. 787; 39 Am. Dec. 344; *Elizabeth City Academy v. Lindsay*, 6 Ired. 476; 45 Am. Dec. 500. The state alone can enforce the forfeiture of a corporate franchise for

neglect to make the returns of its expenditures and profits as required by its charter: *State v. Fourth New Hampshire Turnpike*, 15 N. H. 162; 41 Am. Dec. 690, and note. An action brought by the attorney general to annul the charter of a corporation, because it has by violation of law become liable to dissolution, is strictly a people's action, which may be brought in the name of the people without a relator: *People v. Buffalo Stone etc. Co.*, 131 N. Y. 140. See *People v. Dashawry Assn.*, 84 Cal. 115. Where there has been no waiver of forfeiture a judgment in a *scire facias* proceeding by the people against the corporation that the corporate rights be forfeited, operates to dissolve the corporation: *Danville Seminary v. Mott*, 136 Ill. 289. See the extended note to *State v. Atchison etc. R. R. Co.*, 8 Am. St. Rep. 179.

CORPORATIONS—CREATION.—A substantial compliance with all the provisions of the law under which a corporation is created is required before the corporation can be said to have such an existence as entitles it to do business: *Walton v. Oliver*, 49 Kan. 107; 33 Am. St. Rep. 355, and note; *People v. Montecito Water Co.*, 97 Cal. 276; 33 Am. St. Rep. 172, and extended note.

CORPORATIONS.—INJUNCTIONS TO RESTRAIN THE UNLAWFUL EXERCISE OF CORPORATE PRIVILEGES: See the extended note to *Orighton v. Dahmer*, 35 Am. St. Rep. 675.

ALABAMA GREAT SOUTHERN R. R. Co. v. CARROLL.

[97 ALABAMA, 126.]

NEGLIGENCE—FELLOW-SERVANTS.—A master is not liable for an injury inflicted upon a servant through the negligence of a fellow-servant.

NEGLIGENCE—FELLOW-SERVANTS.—Car inspectors and trainmen are fellow-servants.

EVIDENCE—PRESUMPTION.—THE COMMON LAW OF ONE STATE is presumed to be the same as that of another state where the action is brought.

CONFLICT OF LAWS—NEGLIGENCE—RECOVERY FOR INJURY RECEIVED IN ANOTHER STATE.—There can be no recovery in one state for injury received through negligence in another, unless the infliction of the injury is actionable under the law of the state where it is sustained.

NEGLIGENCE—RECOVERY FOR INJURY RECEIVED IN ANOTHER STATE.—Although the negligence, which is the proximate cause of injury inflicted by one fellow-servant upon another, occurs in one state, while the injury is received in another, there can be no recovery for such injury in the former state based on its laws, unless a right of action for the injury is given by the laws of the latter.

CONFLICT OF LAWS—EXTRATERRITORIAL OPERATION OF STATUTE.—The law of a state in which a railroad brakeman is injured through the negligence of a fellow-servant determines his right to recover, although that law is opposed to the law of another state in which the negligence occurs, and which is also the domicile of the parties and the place in which the contract of employment is made. If he cannot maintain an action for the injury in the former state he cannot recover in the latter.

J. W. Fewell and A. G. Smith, for the appellant.

Brooks and Brooks, for the appellee.

¹²⁷ McCLELLAN, J. The plaintiff, W. D. Carroll, is, and was at the time of entering into the service of the defendant, the Alabama Great Southern Railroad Company, and at the time of being injured in that service, a citizen of Alabama. The defendant is an Alabama corporation operating a railroad extending from Chattanooga in the state of Tennessee through Alabama to Meridian in the state of Mississippi. At the time of the casualty complained of plaintiff was in the service of the defendant in the capacity of brakeman on freight trains running from Birmingham, Alabama, to Meridian, Mississippi, under a contract which was made in the state of Alabama. The injury was caused by the breaking of a link between two cars in a freight train which was proceeding from Birmingham to Meridian. The point at which the link broke and the injury was suffered was in the state of Mississippi. The evidence tended to show that the link which broke was a defective link, and that it was in a defective condition when the train left Birmingham. It was shown that this link had come to the defendant's road at Chattanooga, Tennessee, with a car which belonged to and came to that point over a road which was foreign to the A. G. S. road; that at Chattanooga this foreign car was coupled into a train of the defendant by means of this link, the destination of the car next in rear of it being Birmingham, and the destination of the second car in the rear of it, which belonged to defendant, being Meridian, to which point the foreign car was also bound. At Birmingham the car between this foreign car and the A. G. S. car which were billed to Meridian was cut out, and these two were coupled together by means of the link which had come to the defendant with the foreign car. The evidence went also to show that the defect in this link consisted in, or resulted from, its having been bent while cold, that this tended to weaken the iron, and in this instance had cracked the link somewhat on the outer curve of the bend, and that the link broke at the point of this crack. It was shown to be the duty of certain employees of defendant stationed along its line to inspect the links attached to cars to be put in trains, or forming the couplings between cars in trains at Chattanooga, Birmingham, and some points between Birmingham and the place where this link broke, and ¹²⁸ also that it was the duty of the conductor of freight trains and the other trainmen to maintain such inspection as occasion afforded throughout the runs or trips of such trains; and the

evidence affords ground for inference that there was a negligent omission on the part of such employees to perform this duty, or, if performed, the failure to discover the defect in, and to remove, this link, was the result of negligence.

The foregoing statement of facts, either proved or finding lodgment in the tendencies of the evidence, together with the evidence of the law of Mississippi, as to the master's liability for injuries sustained by an employee in his service, will suffice for the consideration and determination of the question which is of chief importance in this case, namely, whether the defendant is liable at all on the facts presented by this record for an injury sustained by the defendant in the state of Mississippi. The affirmative of this inquiry is sought to be rested and maintained upon two distinct propositions. In the first place, it is insisted that the negligence which one aspect of the evidence tends to establish is that of the defendant in respect of a duty which the law imposes upon the master, and which, whether performed or undertaken to be performed in the particular instance by the hand of the master, or by the hand of one to whom he had delegated its performance, is yet to be taken as being performed, or attempted to be performed, by the master himself, in such sort that the employer is responsible for its misperformance or nonperformance, whereby injury results to one of his employees, under the doctrine of the common law and wholly irrespective of statutory provisions. These doctrines are presumed, and also shown by the evidence in this case, to obtain in the state of Mississippi; and the defendant being an Alabama corporation it cannot be questioned that an action may be maintained in this state to recover damages for an injury sustained in Mississippi, by one of its servants, if the facts present a good cause of action under the law of that state. It is manifest beyond adverse inference on the evidence, conceding the link, the breaking of which caused the accident, to have been in a defective condition when it came to defendant's road at Chattanooga attached to, and intended to be used in the further transportation of, the foreign car, that it was so used from that point to the place of the accident, that this defective condition of the link was patent to such observation as should have been bestowed upon it, and that the defect in it was the proximate cause of the injury to the plaintiff, it ¹²⁹ is, we say, clear upon every aspect of the testimony, conceding all this to be true, that the use of that link in coupling

the foreign car to the defendant's train, and also in its use throughout the voyage from Chattanooga into Mississippi, was due to the negligence of employees of the defendant who were charged by it with the duty of inspecting the link before and at the time of incorporating the foreign car into this train, and at the several points in Alabama where inspectors were stationed as shown by the evidence; and also of the trainmen charged with the duty of inspection as the train was en route.

There is no pretense that the defendant had not been sufficiently careful in the selection of these inspectors or that they were incompetent. It is not pretended that they were insufficient in number or stationed at points too widely separated along the line. There is no such idea advanced as that the defendant was negligent in the purchasing of links of adequate strength, and supplying them to these inspectors and to trains generally; or that there was any necessity for the continued use of this link upon a discovery of its defective condition; but, on the contrary, it is affirmatively shown that the defendant purchased and supplied its trains and employees with all necessary links of good quality and perfect condition to be used in its trains, to supply the places of links which became defective from use, and to substitute for defective links coming to this road with foreign cars. The only negligence, in other words and in short, which finds support by direction or inference in any tendency of the evidence, is that of persons whose duty it was to inspect the links of the train, and remove such as were defective and replace them with others which were not defective. This was the negligence not of the master, the defendant, but of fellow-servants of the plaintiff, for which at common law the defendant is not liable. Thus it is said in McKinney on Fellow Servants, section 127: "It is a very common thing for train-hands to receive injury through the negligence of persons employed by the company to inspect their cars to discover defects and repair them. The weight of authority, perhaps, is to the effect that the negligence of such employees in the performance of such duties cannot be attributed to the company, and it is consequently not liable for it": Citing among other cases *Smith v. Flint etc. Ry. Co.*, 46 Mich. 258; 41 Am. Rep. 161; *Mackin v. Boston etc. R. R. Co.*, 135 Mass. 201; 46 Am. Rep. 456; *Columbus etc. R. R. Co. v. Webb*, 12 Ohio St. 475; *St. Louis etc. Ry. Co. v. Rice*, 51 Ark. 467; *Kidwell v. Houston etc. R. R. Co.*, 3

Wood, 313; and our own case ¹³⁰ of *Smoot v. Mobile etc. Ry. Co.*, 67 Ala. 13; and these and other cases are cited to the same proposition in 7 Am. & Eng. Ency. of Law, p. 864, note.

There are cases which hold to the contrary, but the law is and has long been settled in this state as we have stated it, the case of *Smoot v. Mobile etc. R. R. Co.*, 67 Ala. 13, being directly in point: *Mobile etc. R. R. Co. v. Thomas*, 42 Ala. 672, 720 et seq; *Mobile etc. Ry. Co. v. Smith*, 59 Ala. 245; *Louisville etc. R. R. Co. v. Allen*, 78 Ala. 494.

This being the common law applicable to the premises as understood and declared in Alabama, it will be presumed in our courts as thus declared to be the common law of Mississippi, unless the evidence shows a different rule to have been announced by the supreme court of the state as being the common law thereof. The evidence adduced here fails to show any such thing; but to the contrary it is made to appear from the testimony of Judge Arnold and by the decisions of the supreme court of Mississippi which were introduced on the trial below that that court is in full accord with this one in this respect. Indeed, if any thing, those decisions go further than this court has ever gone in applying the doctrine of fellow-servants to the exemption of railway companies from liability to one servant for injuries resulting from the negligence of another, holding in one case that an hostler whose only duty it was to supply an engine with sufficient sand before turning it over to the engineer to go on the road is a fellow-servant of the engineer for whose negligent failure to supply the same the company would not be liable: *Louisville etc. Ry. Co. v. Petty*, 67 Miss. 255; 19 Am. St. Rep. 304; in another, that a section foreman and a laborer working under him were fellow-servants in such sort that their common master would not be liable for the negligence of the former in attempting to repair a fishbar which he ought to have discarded and applied for a new one: *Iagrone v. Mobile etc. R. R. Co.*, 67 Miss. 592; and in yet another case, that a section foreman and trainman are fellow-servants in respect of the negligence of the former unknown to the company in failing to keep the track in repair, and that an engineer on a passing train who was injured in consequence could not recover against common employer: *New Orleans etc. R. R. Co. v. Hughes*, 49 Miss. 258; and the doctrine of this case is said by Mr. McKinney to be "substantially the rule recognized by the English common-law decisions": McKinney on Fellow Servants, p.

82, sec. 29. See, also, *McMaster v. Illinois Cent. R. R. Co.*, 65 Miss. 264; 7 Am. St. Rep. 653.

¹³¹ Proceeding, therefore, on the presumptions we are authorized to indulge, and also on the evidence adduced in this case as to the law of Mississippi in this connection, and upon the testimony most favorable to the plaintiff as to the cause of his injuries, we feel entirely safe in declaring that plaintiff has shown no cause of action under the common law as it is understood and applied both here and in Mississippi.

It is, however, further contended that the plaintiff, if his evidence be believed, has made out a case for the recovery sought under the Employer's Liability Act of Alabama, it being clearly shown that there is no such or similar law of force in the state of Mississippi. Considering this position in the abstract; that is, dissociated from the facts of this particular case which are supposed to exert an important influence upon it, there cannot be two opinions as to its being unsound and untenable. So looked at, we do not understand appellee's counsel even to deny either the proposition or its application to this case that there can be no recovery in one state for injuries to the person sustained in another, unless the infliction of the injuries is actionable under the law of the state in which they were received. Certainly this is the well-established rule of law, subject in some jurisdictions to the qualification that the infliction of the injuries would also support an action in the state where the suit is brought had they been received within that state: 3 Am. & Eng. Ency. of Law, 508, 509; *Hyde v. Wabash etc. Ry. Co.*, 61 Iowa, 441; 47 Am. Rep. 820; *East Tennessee etc. R. R. Co. v. Lewis*, 89 Tenn. 235; *Buckles v. Ellers*, 72 Ind. 220; 37 Am. Rep. 156; *Willis v. Missouri Pac. Ry. Co.*, 61 Tex. 432; 48 Am. Rep. 301; *Woodard v. Michigan etc. R. R. Co.*, 10 Ohio St. 121; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Debevoise v. New York etc. R. R. Co.*, 98 N. Y. 377; 50 Am. Rep. 683; *Nashville etc. Ry. Co. v. Foster*, 10 Lea, 351; 2 Rorer on Railroads, 1149; *Kahl v. Memphis etc. R. R. Co.*, 95 Ala. 337; *Chicago etc. R. R. Co. v. Doyle*, 60 Miss. 977; *Davis v. New York etc. R. R. Co.*, 143 Mass. 301; 58 Am. Rep. 138; *Le Forest v. Tolman*, 117 Mass. 109; 19 Am. Rep. 400; *Limekiller v. Hannibal etc. R. R. Co.*, 33 Kan. 83; 52 Am. Rep. 523; *The Scotland*, 105 U. S. 24; *The Santa Cruz*, 1 C. Rob. 50; *Atchison etc. R. R. Co. v. Moore*, 29 Kan. 632.

But it is claimed that the facts of this case take it out of the general rule which the authorities cited above abundantly support, and authorize the courts of Alabama to subject the defendant to the payment of damages under section 2590 of the code, although the injuries counted on were sustained in Mississippi under circumstances which involved no liability on the defendant by the laws of that state.

¹³² This insistence is in the first instance based on that aspect of the evidence which goes to show that the negligence which produced the casualty transpired in Alabama, and the theory that wherever the consequence of that negligence manifested itself, a recovery can be had in Alabama. We are referred to no authority in support of this proposition, and exhaustive investigation on our part has failed to disclose any. There are at least two well-considered cases against it, one of which involved an effort to recover for personal injuries sustained in Alabama under circumstances which afforded no cause of action in Alabama in the courts of Tennessee, where the casual negligence occurred, and where also had the negligence manifested itself in the results complained of there the plaintiff would have been entitled to recover. The accident happened on a train going from Nashville to Chattanooga, in Tennessee, on a railway which runs for a comparatively short distance through Alabama. The negligence relied on consisted in the failure of employees of the defendant charged in that behalf to discover and remedy a defective brake before the train left Nashville, as well as during its passage through Tennessee. While the train was running through Alabama a brakeman was killed in consequence of the defect in this brake. All this is precisely on all fours with our case in those of its aspects most favorable to the plaintiff. That plaintiff, the court conceded, would have had a good cause of action under the law of Tennessee, the place of the negligence, if his intestate had been injured within its limits. So here, the plaintiff on one aspect of the evidence would have had a good cause for action in Alabama, the place of the negligence, had he been injured in Alabama. But it was found in that case that the law of Alabama gave no cause of action for the negligent failure to inspect the appliances used in operating a train, but held the brakeman and the inspectors to be fellow-servants in respect thereto, just as here the laws of Mississippi afforded no redress for the consequence of such negligence, though

our statutes have since the Tennessee decision provided therefor; and it was held on the authority of *Mobile etc. R. R. Co. v. Thomas*, 42 Ala. 672, that there could have been no recovery in Alabama, and that of consequence no cause of action existed in Tennessee, the court saying: "There is no question but the laws of Alabama . . . controlled the rights of the parties in this case, and whether there was error in this part of the charge (referring to an instruction as to defendant's liability on the negligence shown) as given, or the refusal of the specific instructions asked for (substantially ¹²³ that the negligence of a car inspector from which a brakeman suffers injury is no ground for action against their common employer), depends wholly upon the laws of that state": *Nashville etc. Ry. Co. v. Foster*, 10 Lea, 352.

In the other case the precise point here under consideration was brought before the supreme court of Mississippi, in an action instituted in that state sounding in damages for fatal injuries inflicted upon plaintiff's intestate in the state of Tennessee. It was insisted that inasmuch as the death of the deceased resulted from the negligent failure of a train dispatcher in Mississippi to give requisite orders to the trainmen at a certain point in Tennessee, the rights of the parties were determinable by the laws of Mississippi, the place of the disastrous negligent omission. But the court held to the contrary, saying: "The right of the appellee is determinable by the laws of Tennessee, in which state the killing of her husband occurred. The view that no recovery could be had here, except for a result traceable to an omission of duty in Mississippi is unfounded. Physical force proceeding from this state and inflicting injury in another state might give rise to an action in either state and *vice versa*, but the omission of duty in Mississippi cannot transfer a consequence of it manifested physically in another state to Mississippi. The cases of injuries commenced in one jurisdiction and completed in another illustrate our views on this subject. The true view is that the legal entity called the corporation is omnipresent on its railroad, and the presence or absence of negligence with respect to an occurrence at any point of the line is not to be resolved by the place at which an officer or employee was stationed for duty. The question is as to duty operating effectually at the place where its alleged failure caused harm to result. The locality of the collision was in Tennessee. It was there, if anywhere, that the company was remiss in

duty, for there is where its proper caution should have been used": *Chicago etc. R. R. Co. v. Doyle*, 60 Miss. 977, 984. If this doctrine was properly applied to the facts of that case where the act to be performed, the failure to perform which caused the injury, could only be performed at a point in Mississippi and by an employee who was stationed and remained at that place, it would seem to address itself with more force to the case at bar where it appears the corporation was in fact present with the train and with the defective link every inch of the journey from Birmingham to the point of the accident in the person of the conductor and other trainmen who were charged ¹²⁴ with the duty all along the line of discovering and removing the unsafe appliances.

The position of the Mississippi court appears to us to be eminently sound in principle and upon logic. It is admitted, or at least cannot be denied, that negligence of duty unproductive of damnifying results will not authorize or support a recovery. Up to the time the train passed out of Alabama no injury had resulted. For all that occurred in Alabama, therefore, no cause of action whatever arose. The fact which created the right to sue, the injury without which confessedly no action would lie anywhere, transpired in the state of Mississippi. It was in that state, therefore, necessarily that the cause of action, if any, arose; and whether a cause of action arose and existed at all or not must in all reason be determined by the law which obtained at the time and place when and where the fact which is relied on to justify a recovery transpired. Section 2590 of the code of Alabama had no efficiency beyond the lines of Alabama. It cannot be allowed to operate upon facts occurring in another state so as to evolve out of them rights and liabilities which do not exist under the law of that state which is of course paramount in the premises. Where the facts occur in Alabama and a liability becomes fixed in Alabama, it may be enforced in another state having like enactments, or whose policy is not opposed to the spirit of such enactments, but this is quite a different matter. This is but enforcing the statute upon facts to which it is applicable all of which occur within the territory for the government of which it was enacted. Section 2590 of the code, in other words, is to be interpreted in the light of universally recognized principles of private international or interstate law, as if its operation had been expressly limited to his state and as if its first line read as follows: "When a

personal injury is received in Alabama by a servant or employee," etc. The negligent infliction of an injury here, under statutory circumstances, creates a right of action here, which, being transitory, may be enforced in any other state or country the comity of which admits of it; but for an injury inflicted elsewhere than in Alabama our statute gives no right of recovery, and the aggrieved party must look to the local law to ascertain what his rights are. Under that law this plaintiff had no cause of action, as we have seen, and hence he has no rights which our courts can enforce, unless it be upon a consideration to be presently adverted to. We have not been inattentive to the suggestions of counsel in this connection, which are based upon that rule of the statutory and common criminal ¹³⁵ law under which a murderer is punishable where the fatal blow is delivered, regardless of the place where death ensues: *Green v. State*, 66 Ala. 40; 41 Am. Rep. 244. This principle is patently without application here. There would be some analogy if the plaintiff had been stricken in Alabama and suffered in Mississippi, which is not the fact. There is, however, an analogy which is afforded by the criminal law, but which points away from the conclusion appellee's counsel desire us to reach. This is found in that well-established doctrine of criminal law, that where the unlawful act is committed in one jurisdiction or state and takes effect -- produces the result which it is the purpose of the law to prevent, or, it having ensued, punish for—in another jurisdiction or state, the crime is deemed to have been committed and is punished in that jurisdiction or state in which the result is manifested, and not where the act was committed: 1 Bishop's Criminal Law, sec. 110 et seq.; 1 Bishop's Criminal Procedure, sec. 53 et seq.

Another consideration—that referred to above—it is insisted, entitles this plaintiff to recover here under the Employer's Liability Act for an injury inflicted beyond the territorial operation of that act. This is claimed upon the fact that at the time the plaintiff was injured, he was in the discharge of duties which rested on him by the terms of a contract between him and defendant which had been entered into in Alabama, and, hence, was an Alabama contract, in connection with the facts that plaintiff was and is a citizen of this state, and the defendant is an Alabama corporation. These latter facts—of citizenship and domicile respectively of plaintiff and defendant—are of no importance in this con-

nection, it seems to us, further than this: they may tend to show that the contract was made here, which is not controverted, and if the plaintiff has a cause of action at all, he, by reason of them, may prosecute it in our courts. They have no bearing on the primary question of existence of a cause of action, and, as that is the question before us, we need not further advert to the fact of plaintiff's citizenship or defendant's domicile.

The contract was that plaintiff should serve the defendant in the capacity of a brakeman on its freight train between Birmingham, Alabama, and Meridian, Mississippi, and should receive as compensation a stipulated sum for each trip from Birmingham to Meridian and return. The theory is that the Employer's Liability Act became a part of this contract; that the duties and liabilities which it prescribes became contractual duties and liabilities, or duties and liabilities springing out of the contract, and that these duties¹³⁶ attended upon the execution whenever its performance was required—in Mississippi as well as in Alabama—and that the liability prescribed for a failure to perform any of such duties attached upon such failure and consequent injury wherever it occurred, and was enforceable here because imposed by an Alabama contract notwithstanding the remission of duty and the resulting injury occurred in Mississippi, under whose laws no liability was incurred by such remission. The argument is that a contract for service is a condition precedent to the application of the statute, and that "as soon as the contract is made the rights and obligations of the parties, under the Employer's Act, became vested and fixed," so that "no subsequent repeal of the law could deprive the injured party of his rights nor discharge the master from his liabilities," etc. If this argument is sound, and it is sound if the duties and liabilities prescribed by the act can be said to be contractual duties and obligations at all, it would lead to conclusions the possibility of which has not hitherto been suggested by any court or law-writer, and which, to say the least, would be astounding to the profession. For instance: If the act of 1885 becomes a part of every contract of service entered into since its passage, just "as if such law were in so many words expressly included in the contract as a part thereof," as counsel insist it did, so as to make the liability of the master to pay damages from injuries to a fellow-servant of his negligent employee a contractual obligation, no

reason can be conceived while the law existing in this regard prior to the passage of that act did not become in like manner a part of every contract of service, then entered into, so that every such contract would be deemed to contain stipulations for the nonliability of the master for injuries flowing from the negligence of a fellow-servant, and confining the injured servant's right to damage to a claim against his negligent fellow-servant—the former, in other words, agreeing to look alone to the latter. There were many thousands of such contracts existing in this country and England at the time when statutes similar to section 2590 of our code were enacted; there were, indeed, many thousands of such contracts existing in Alabama when that section became the law of this state. Each of these contracts, if the position of plaintiff as to our statute being embodied into the terms of his contract so that its duties were contractual duties, and its liabilities contractual obligations to pay money can be maintained, involved the assurances of organic provisions, state and federal, of the continued nonliability of the master for the ¹⁸⁷ negligence of his servants, notwithstanding the passage of such statutes.

Yet the statutes were passed, and they have been applied to servants under pre-existing contracts as fully as to servants under subsequent contracts, and there has never been a suggestion even in any part of the common-law world that they were not rightly so applied. If plaintiff's contention is well taken, many a judgment has gone on the rolls in this state, and throughout the country, and has been satisfied, which palpably overrode vested rights without the least suspicion on the part of court or counsel that one of the most familiar ordinances of the fundamental law was being violated. Nay more, another result not heretofore at all contemplated would ensue. Contracts for service partly in Alabama might be now entered into in adjoining states where the common-law rule still obtains, as in Mississippi, for instance, where the servant has no right to recover for the negligence of his fellow, and the assumption of this risk under the law becoming, according to the argument of counsel, a contractual obligation to bear it, such contracts would be good in Alabama, and as to servants entering into them, our statute would have no operation even upon negligence and resulting injury within its terms occurring wholly in Alabama. And on the other hand, if this defendant is under a contractual obligation to

pay the plaintiff the damages sustained by him because of the injury inflicted in Mississippi, the contract could be of course enforced in Mississippi, and damages there awarded by its courts, notwithstanding the law of that state provides that there can be no recovery under any circumstances whatever by one servant for the negligence of his fellow-employee. We do not suppose that such a proposition ever has been or ever will be made in the courts of Mississippi. Yet that it should be made and sustained is the natural and necessary sequence of the position advanced in this case. These considerations demonstrate the infirmity of plaintiff's position in this connection, and serve to show the necessity and propriety of the conclusion we propose to announce on this part of the case. That conclusion is, that the duties and liabilities incident to the relation between the plaintiff and the defendant which are involved in this case are not imposed by, and do not rest in, or spring from, the contract between the parties. The only office of the contract, under section 2590 of the code, is the establishment of a relation between them, that of master and servant; and it is upon that relation, that incident or consequence of the contract, and not upon the rights of the parties under the contract, that our statute operates. The law is not concerned ¹²⁸ with the contractual stipulations, except in so far as to determine from them that the relation upon which it is to operate exists. Finding this relation the statute imposes certain duties and liabilities on the parties to it wholly regardless of the stipulations of the contract as to the rights of the parties under it, and, it may be, in the teeth of such stipulations. It is the purpose of the statute, and must be the limit of its operation, to govern persons standing in the relation of master and servants to each other in respect of their conduct in certain particulars within the state of Alabama. Mississippi has the same right to establish governmental rules for such persons within her borders as Alabama; and she has established rules which are different from those of our law. And the conduct of such persons toward each other is, when its legality is brought in question, to be adjudged by the rules of the one or the other states as it falls territorially within the one or the other. The doctrine is like that which prevails in respect of other relations, as that of man and wife. Marriage is a contract. The entering into this contract raises up certain duties and imposes certain liabilities in all civilized countries. What these duties and

liabilities are at the place of the contract are determined by the law of that place; but when the parties go into other jurisdictions the relation created by the contract under the laws of the place of its execution will be recognized, but the personal duties, obligations, and liabilities incident to the relation are such as exist under the law of the jurisdiction in which an act is done or omitted as to the legality, effect, or consequence of which the question arises. It might as well be said where there is a marriage in Alabama and the parties remove to Mississippi, and the wife there makes a contract which is void in Mississippi, but valid under our statute, and subsequently they return to Alabama, that our courts will enforce that contract, or if such husband while in Mississippi does an act which is innocuous and lawful in that state, but which if done here would entail liability upon him, and the parties afterwards return here, that the liability imposed by our laws could be enforced here, because the parties entered into the contract here, as that a master is liable here for conduct towards his servant which was proper, or at least involved no liability, where it took place, simply because the contract which created the relation was entered into in this state. The whole argument is at fault. The only true doctrine is that each sovereignty, state, or nation, has the exclusive power to finally determine and declare what acts or ¹²⁹ omissions in the conduct of one to another, whether they be strangers or sustain relations to each other which the law recognizes, as parent and child, husband and wife, master and servant, and the like, shall impose a liability in damages for the consequent injury, and the courts of no other sovereignty can impute a damnifying quality to an act or omission which afforded no cause of action where it transpired.

These propositions find illustration and support in the case of *Whitford v. Panama R. R. Co.*, 23 N. Y. 465, where the relation involved was that of carrier and passenger, a relation which had been created by a contract made in New York between a corporation and a citizen thereof for carriage, commencing in that state and ending in San Francisco, via Panama and over the Panama railroad. The passenger was killed through the fault of the corporation's servants while being transported along this railroad. The law of New York gave to the personal representative of a person whose death was caused by the wrongful act or omission of another a right of action therefor in all cases where the deceased, had the injury

fallen short of death, could have recovered. It did not appear that the laws of New Granada, where the injury was inflicted, authorized any recovery on the facts alleged and proved. It was urged, as here, that the domicile of the parties and the fact that they contracted in New York took the case out of general rules as to territorial limitations upon the operation of statutes, but the plaintiff was nonsuited, it being held in effect that the laws of New Granada were controlling as to the duties and liabilities incident to the relation which existed between them, while the contract of carriage was being performed in that country, and that the carrier, so far as care and diligence were concerned, owed the passenger no duties there except such as were imposed upon the relation by the local law, and that no liability for negligence and its results not prescribed by that law rested on the company. And the court, *inter alia*, said: "Suppose the government of New Granada to have enacted that the proprietors of a railroad company should not be responsible for the negligence of its servants, provided there was no want of due care in selecting them; it could not be pretended that its will could be set at naught by prosecuting the corporation in the courts of another state where the law was different. . . . The true theory is, that no suit whatever respecting this injury could be sustained in the courts of this state except pursuant to the law of international comity. By that law foreign contracts and foreign transactions, out of which liabilities have arisen, ¹⁴⁰ may be prosecuted in our tribunals by the implied assent of the government of this state; but in all such cases we administer the foreign law as from the proofs we find it to be, or as without proofs we presume it to be." So, in the case of *Gray v. Jackson*, 51 N. H. 9, 12 Am. Rep. 1, there was a contract of affreightment, by the terms of which goods were to be carried out of one state into and through other states. They were lost in a state other than that in which the contract was made and the carriage commenced. By the law of the place of the contract the carrier was liable for the loss under the circumstances shown in evidence had it occurred in that state. By the law of the state where the loss occurred, however, the carrier was not liable. In an action for the loss prosecuted in the state of the contract the law, not of that state, but of the place of the loss which operated as to the particular transaction on the relation of shipper and carrier, and prescribed the duties and liabilities incident to that relation in that state, regard-

less of the place where the contract creating the relation was entered into, was applied and made to determine the rights of the parties to be other than they were under the law of the place of the contract which was also, as here, the place of the forum.

The foregoing views will suffice to indicate the grounds of our opinion that the rights of this plaintiff are determinable solely by the law of the state of Mississippi, and of our conclusion that upon no aspect or tendency of the evidence as to the circumstances under which the injury was sustained, and as to the laws of Mississippi obtaining in the premises, was the plaintiff entitled to recover.

The general affirmative charge requested for defendant should have been given. The other very numerous assignments of error need not be considered.

For the error in refusing to instruct the jury to find for the defendant if they believed the evidence, the judgment is reversed and the cause will be remanded.

MASTER AND SERVANT—LIABILITY GENERALLY OF MASTER FOR NEGLIGENCE OF COEMPLOYER.—A master is not liable to a servant for injury resulting from the negligence of a fellow-servant where there has been no negligence on the part of the master: *Daves v. Southern Pac. Co.*, 98 Cal. 19; 35 Am. St. Rep. 133; *Daniels v. Chesapeake etc. Ry. Co.*, 36 W. Va. 397; 32 Am. St. Rep. 870; *Kehoe v. Allen*, 92 Mich. 464; 31 Am. St. Rep. 608, and note; *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180, and note; *Theleman v. Moeller*, 73 Iowa, 108; 5 Am. St. Rep. 663, and note; *Fisk v. Central Pac. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22; *Hobbs v. Atlantic etc. R. R. Co.*, 107 N. C. 1; *Young v. Virginia etc. Construction Co.*, 109 N. C. 618. See, further, the extended notes to *Adams v. Iron Cliffs Co.*, 18 Am. St. Rep. 455, and *Murray v. South Carolina R. R. Co.*, 36 Am. Dec. 279.

RAILROADS—CAR INSPECTORS AND TRAINMEN, WHETHER FELLOW-SERVANTS.—A railroad company is not liable to a brakeman for the negligence of a car inspector: *Mackin v. Boston etc. R. R.*, 135 Mass. 201; 46 Am. Rep. 456; *Smith v. Flint etc. Ry. Co.*, 46 Mich. 258; 41 Am. Rep. 161, and note. A car inspector is not a coemployee with a brakeman: *Ohio etc. Ry. Co. v. Percy*, 128 Ind. 197; *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep. 67; *Tierney v. Minneapolis etc. R. R. Co.*, 33 Minn. 311; 53 Am. Rep. 35, and note. See the note to *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 31.

EVIDENCE—PRESUMPTION—COMMON LAW.—The common law of another state will be presumed to be the same as this: *Commonwealth v. Graham*, 157 Mass. 73; 34 Am. St. Rep. 255, and note. See, also, *Thomas v. Pendleton*, 1 South Dak. 150; 36 Am. St. Rep. 726, and note.

STATUTES—EXTRATERRITORIAL EFFECT OF.—A foreign law in cases other than penal actions, if not contrary to our public policy, or to abstract justice, or pure morals, or calculated to injure the state or its citizens, will be

recognized and enforced here if we have jurisdiction over the necessary parties: *Higgins v. Central New England etc. R. R. Co.*, 155 Mass. 176; 31 Am. St. Rep. 544, and note. Courts of this state will enforce rights which accrued in a foreign state provided they accrued under a statute similar in import and character to one in force here: *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep. 67, and note. A cause of action created by the statute of one state will not support an action in another: *Ash v. Baltimore etc. R. R. Co.*, 72 Md. 144; 20 Am. St. Rep. 461.

NEGLIGENCE—RECOVERY FOR INJURIES RECEIVED IN ANOTHER STATE. An action to recover damages for injuries received in another state than the one in which the action is brought, resulting in the death of the person injured, can be maintained only upon proof that the statutes of such other states give the right of action, and that they are similar to the statutes of the state in which the action is brought: *Wooden v. Western New York etc. R. R. Co.*, 126 N. Y. 10; 22 Am. St. Rep. 803; note to *Ash v. Baltimore etc. R. R. Co.*, 20 Am. St. Rep. 467; extended note to *Attrill v. Huntington*, 14 Am. St. Rep. 350. See, further, *Higgins v. Central New England R. R. Co.*, 155 Mass. 176, 31 Am. St. Rep. 544, and note, and *Oates v. Union Pac. Ry. Co.*, 104 Mo. 514, 24 Am. St. Rep. 348, and note.

WESTERN RAILWAY OF ALABAMA v. MUTCH.

[97 ALABAMA, 194.]

NEGLIGENCE—PROXIMATE CAUSE.—Persons who perpetrate torts are responsible only for the proximate consequences thereof.

NEGLIGENCE—PROXIMATE CAUSE.—Proximate cause is that which is a natural and continuous sequence, unbroken by any efficient, intervening cause, producing the result complained of, and without which that result would not have occurred.

NEGLIGENCE—PROXIMATE CAUSE.—Running a railroad train through a town at a rate of speed in excess of that permitted by ordinance is not proximate cause, so as to make the company liable for the death of a boy nine years of age who is killed in attempting to board such moving train within the town limits.

NEGLIGENCE.—INFANTS OF TENDER YEARS AND WANTING IN DISCRETION are not amenable to the disabling effects of contributory negligence.

CONTRIBUTORY NEGLIGENCE IS NO DEFENSE to injuries which result from gross negligence.

NEW TRIAL—VERDICT AGAINST EVIDENCE.—That a verdict is palpably against the evidence is good ground for a new trial.

G. P. Harrison and R. F. Ligon, Jr., for the appellant.

A. and R. B. Barnes, W. J. Samford, and J. M. Chilton, for the appellee.

¹⁹⁵ **STONE, C. J.** The plaintiff, George Mutch, was a resident of Opelika. His son, James Mutch, was nine and a half years old, well grown and developed for his age, and in intelligence and brightness was above the average of boys of his

age. He went at large, without being attended by a nurse or protector, and was attending school.

The Western Railway of Alabama runs through Opelika, and has a station and depot in that city or town. There was an ordinance in force in Opelika which made it unlawful to run a train of cars within the corporate limits at a higher rate of speed than four miles an hour, and imposing a penalty for its violation. A freight train of the railroad was coming into Opelika on an afternoon in March, 1889. It had box-cars, and attached to the side of one of them was a ladder, placed there to enable brakemen to reach the top of the car. The little boy, James, having placed himself at the side of the track, attempted to seize the ladder as it passed him, that he might climb up on it, and thus enjoy a ride. He did succeed in catching a round of the ladder, but, in attempting to ascend, he missed his footing, fell under the train, and was so injured and crushed that he died of the wounds. Up to this point there is no conflict or uncertainty in the testimony.

The present suit was brought against the railroad, and seeks to recover damages from it for this alleged negligent killing of plaintiff's intestate. The negligence charged—and there is no other pretended or attempted to be shown—is, that the train was being moved at a greater rate of speed than four miles an hour. Some of plaintiff's witnesses testified that it was moving at the rate of six or seven miles an hour. On the other hand defendant's witnesses placed the speed, some as low as three, and none above four, miles an hour. This was not the first time intestate had attempted ¹⁸⁸ to spring on moving trains, and he had been more than once cautioned against such attempts.

Assuming that the speed of the train was in excess of four miles an hour, was there a causal connection between such breach of duty on the part of the railroad company and the injury done to plaintiff's intestate?

Persons who perpetrate torts are, as a rule, responsible, and only responsible for the proximate consequences of the wrongs they commit. In other words, unless the tort be the proximate cause of the injury complained of, there is no legal accountability. In that able and valuable work, 16 Am. & Eng. Ency. of Law, 436, is this language: "A proximate cause may be defined as that cause which is a natural and continuous sequence, unbroken by any efficient, intervening

cause producing the result complained of, and without which that result would not have occurred. And it is laid down in many cases and by leading text-writers that in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it was such as might or ought to have been foreseen in the light of the attending circumstances." On page 431 of the same volume it is said: "To constitute actionable negligence, there must be not only causal connection between the negligence complained of and the injury suffered, but the connection must be by a natural and unbroken sequence—without intervening, efficient causes—so that but for the negligence of the defendant the injury would not have occurred; it must not only be a cause, but it must be the proximate; that is, the direct and immediate, efficient cause of the injury."

That philosophic law-writer, Dr. Wharton (Law of Negligence, sec. 75), expresses the principle as follows: "If the consequence flows from any particular negligence, according to ordinary natural sequence, without the intervention of any human agency, then such sequence, whether foreseen as probable or unforeseen, is imputable to the negligence." Quoting from Ch. B. Pollock with apparent approval, he in section 78 says: "I entertain considerable doubt whether a person who has been guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. I am inclined to consider the rule of law to be this: that a person is expected to anticipate and guard ¹⁸⁷ against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur." In the same section he quotes approvingly the following language from Lord Campbell: "If the wrong and the legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support an action."

In Shearman and Redfield's Law of Negligence, section 26, the principle is thus stated: "The proximate cause of an event

must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred."

The authorities from which we have quoted are everywhere regarded as standard. What they assert is but the condensation of the utterances of a very great number of the highest judicial tribunals, wherever the principles of the common law prevail: See 16 Am. & Eng. Ency. of Law, 428, 429; *Milwaukee etc. Ry. Co. v. Kellogg*, 94 U. S. 469; *Herring v. Skaggs*, 62 Ala. 180; 34 Am. Rep. 4; *Daughtry v. American U. Tel. Co.*, 75 Ala. 168; 51 Am. Rep. 435.

Lynch v. Nurdin, 1 Q. B., N. S., 29 (41 Eng. Com. Law Rep. 422), is the strongest of the cases relied on in support of the present action. The injury in that case occurred in a city. The head note contains a summation of the facts as follows: "Defendant (a cartman) negligently left his horse and cart unattended in the street. Plaintiff, a child seven years old, got upon the cart in play; another child incautiously led the horse on; and plaintiff was thereby thrown down and hurt." It was held that the action was maintainable for the recovery of damages, "and that it was properly left to the jury, whether defendant's conduct was negligent, and the negligence caused the injury." In delivering his opinion Lord Denman used the following language; "If I am guilty of negligence in leaving any thing dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of the third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both, or either of the two, but unquestionably against the first. . . . Can the plaintiff, then, consistently with the authorities, maintain his action, having been at least equally in fault?"

"The answer is, that supposing ¹⁹⁸ that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child, in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation."

Reading the case of *Lynch v. Nurdin*, 1 Q. B., N. S., 29, in the light shed upon it by Lord Denman's reasoning, no one can fail to note the marked difference between that case and

the one we have in hand. The argument by which the learned Lord Chief Justice supported the judgment he announced has no application to the present one. That case was manifestly decided on the well-recognized principle, that if one leave dangerous machinery, or any other thing of similar nature, unattended in an exposed place, and another be injured thereby, an action on the case may be maintained for such injury, unless plaintiff was guilty of contributory negligence: *Clark v. Chambers*, 3 Q. B. Div. 327; *Kunz v. City of Troy*, 104 N. Y. 344; 58 Am. Rep. 508; *Stout v. Sioux City etc. R. R. Co.*, 2 Dill. 294; Beach on Contributory Negligence, secs. 140, 206. Infants of tender years, and wanting in discretion, are not amenable to the disabling effects of contributory negligence. In the opinion of the court in the case of *Lynch v. Nurdin*, 1 Q. B., N. S., 29, the causal connection between the negligence and the injury was so direct and patent, that the driver, exercising ordinary care and prudence, should have anticipated and guarded against it. The implication from Lord Denman's language is very strong that he regarded the cartman's conduct as grossly negligent. Contributory negligence is no defense to injuries which result from gross negligence. But, the principle declared in *Lynch v. Nurdin*, was, if not materially shaken, at least shown to be inapplicable to a case like the present one, in the two later cases of *Hughes v. Macfie*, 2 Hurl. & C. 744, and *Mangan v. Atterton*, L. R. 1 Ex. 239. See, also, *McAlpin v. Powell*, 70 N. Y. 126; 26 Am. Rep. 555; *Wendell v. New York Cent. etc. R. R. Co.*, 91 N. Y. 420; *St. Louis etc. R. R. Co. v. Bell*, 81 Ill. 76; 25 Am. Rep. 269.

The case of *Messenger v. Dennie*, 137 Mass. 197, 50 Am. Rep. 295, is a strong authority against the right to maintain the present action.

Another case relied on in support of the present action is *Railroad Co. v. Gladmon*, 15 Wall. 401. That case is wholly unlike the present one, and rests on a different principle. The negligence of defendant's agent was manifest, and the injury was the natural consequence of the negligence. Had the driver been looking ahead as he should ¹⁹⁹ have been, he would have seen the child's danger, and could and would have stopped his car, before his horses did the injury. The causal connection in that case was complete, because the injury resulted so naturally from the driver's inattention, that the law regards it as the probable consequence of his negli-

gence. None of the cases cited support the contention of appellee.

The ordinance of Opelika restricting the speed of trains within the corporate limits to four miles an hour had one purpose, one policy. Opelika is a town probably of four or more thousand inhabitants. The railroad antedated the town, and caused its location there. It runs centrally through the business portions of the place. In such conditions men pursuing business avocations, as well as idlers and curiosity seekers, will congregate about the depot and track of the railroad, and will be constantly crossing, if not standing on the track. They do both. Knowing this habit of men, most towns located on railroads have ordinances requiring trains passing through them to move at a low rate of speed. Why? Not because they apprehend that reckless persons will attempt to board the train while in motion. The wildest conjecture would scarcely take in an adventure so fraught with peril. The policy was to enable persons who might be standing on the track, or whose business pursuits required them to be crossing it to get off the track and thus escape the danger of a collision. The ordinance had no other aim.

We hold as matter of law that there was no proof whatever in this case tending to show a causal connection between the negligence charged and the injury suffered. To illustrate our views, let us suppose that the negligence charged against the railroad company had been not the too rapid movement of the train, but some imperfection, decay, or derangement of the ascending ladder which caused plaintiff's intestate to fall and lose his life. Would any one contend the railroad company would be liable for such accident, and is there a difference in principle between the case supposed and the one we have in hand? Charge No. 21—the general charge in favor of the defendant—ought to have been given.

The great English commentator said "Law is the perfection of human reason." This, in a sense, is true. It is the expression of the combined wisdom of the legislative body. It is the creature, however, of human thought, and nothing human is perfect. Nor is it true that legislative policy is unchanging. Conditions change, and the law which should ²⁰⁰ adapt itself to human wants must change with them. Still, while the law stands on the statute book, it should be obeyed and conformed to as a rule of action. If we cut loose from its restraints we expose ourselves to the tempests of

human passion and human prejudice, and, like a ship at sea without rudder or compass, will surely be dashed on some of the many shoals which are found all along the voyage of life.

Trial by jury is a bulwark of American, as it has long been of English, freedom. It wisely divides the responsibility of determinative adjudication, of punitive administration, between the judge, trained in the wisdom and intricacies of the law, and twelve men chosen from the common walks of non-professional life, chosen for their sound judgment and stern impartiality. The one declares the rules of law applicable to the issue or issues formed in the light of testimony adduced; the other weighs the testimony, determines what facts it proves, and, moulded by the law as declared by the court, renders its verdict.

In the jury-box, and under the oath the jurors have solemnly sworn on the holy evangelists of almighty God, there is no room for friendship, partiality, or prejudice; no permissible discrimination between friends and enemies, between the rich and the poor, between corporations and natural persons. The ancients painted the goddess of justice as blindfolded, and jurors must be blind to the personal consequences of the verdicts they render. If the testimony convinces their judgments of the existence of certain facts, they must be blind to the consequences which result from those facts. A wish that it were otherwise furnishes no excuse for deciding against their convictions. Justice thus administered commands the approbation of heaven and earth alike; and a verdict thus rendered meets all the requirements of the juror's oath in the fullest sense of the word—a true expression of the convictions fixed on the minds of the jury by the testimony.

Independent of the legal question considered above, and which we have declared to be determinative of this case, the verdict of the jury was so palpably against the evidence that a new trial ought to have been granted on that account.

Reversed and remanded.

IN *Gladsden and Attalla Union Ry. Co. v. Causler*, 97 Ala. 235, it appeared from the evidence that Causler was in the habit of riding on a dummy train and of alighting from it at a certain crossing. Those in charge of the train had notice of his intention to alight at that place, but the train was driven past the crossing without stopping, and was brought to a full stop at the next crossing, only a short distance away. Nothing was said of an intention of backing the train to the crossing where Causler was in the habit of alighting, and he had on previous occasions left the train at the crossing where it was then stopped. On this occasion he had been riding on the

platform of one of the cars in violation of a rule of the railroad company. He was a cripple, and after stepping from the train where it was then stopped, and while in the act of reaching back to the platform for his crutches, the train, without warning or signal, was moved backward, knocking him down, and inflicting the injury for which suit was brought. It was claimed on the part of the company that the fact that he was riding on the car platform immediately before he was injured was the proximate cause of his injury, but the supreme court, in disposing of this branch of the case, said: "We do not think the fact that Causler, the plaintiff, had been riding on the platform of the car should exert any influence in the consideration of this case, for several reasons: 1. He had left the platform, and was standing on the ground, when the train was backed which caused the injury. The injury was not at all dependant on the place from which he had come; 2. Although his being on the platform was one of the attending conditions, without which he probably would not have been able to leave the train during its very short stop, yet there was no causal connection, as the law defines that term, between his violation of the company's rule in so riding and the injury inflicted upon him. We have recently considered this question so fully that we need not repeat the argument or reproduce the authorities: *Western Railway of Alabama v. Mutch*, 97 Ala. 194; 38 Am. St. Rep. 179; Beach on Contributory Negligence, secs. 33, 34."

NEGLIGENCE—PROXIMATE AND REMOTE CAUSE.—This question is thoroughly treated in the monographic note to *Gibson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807-861.

NEGLIGENCE—PROXIMATE CAUSE—VIOLATION OF ORDINANCE.—When negligence in the breach of a city ordinance does not cause or contribute to cause the injury complained of, no action will lie for such breach: *Gibson v. Leonard*, 143 Ill. 182; 36 Am. St. Rep. 376, and note.

CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF CAN NEVER BE SET UP as an excuse for wanton and willful negligence on the part of the defendant: *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596; 32 Am. St. Rep. 218; *Brannen v. Kokomo etc. Gravel Road Co.*, 115 Ind. 115; 7 Am. St. Rep. 411, and note. See, also, the note to *Harris v. Township of Clinton*, 8 Am. St. Rep. 850, and *Kelly v. Inhabitants etc.*, 9 Am. St. Rep. 733.

NEGLIGENCE—CONTRIBUTORY.—INFANTS, WHEN RESPONSIBLE FOR: *Kehler v. Schwenk*, 144 Pa. St. 348; 27 Am. St. Rep. 633, and note, and *Oregon Ry. etc. Co. v. Egley*, 2 Wash. 409; 26 Am. St. Rep. 860, and note, with the cases collected.

NEW TRIAL—VERDICT AGAINST WEIGHT OF EVIDENCE.—A new trial should be granted where the verdict is against the weight of evidence and manifestly wrong: *New Orleans etc. R. R. Co. v. Statham*, 42 Miss. 607; 97 Am. Dec. 478, and note; *Pursley v. Hayes*, 22 Iowa, 1; 92 Am. Dec. 350; *Crossley v. O'Brien*, 24 Ind. 325; 87 Am. Dec. 329; *Woodward v. James*, 3 Strobl. 552; 51 Am. Dec. 649, and note; *Hall v. Page*, 4 Ga. 428; 48 Am. Dec. 235; *Kinne v. Kinne*, 9 Conn. 102; 21 Am. Dec. 732; *Newson v. Lycan*, 3 J. J. Marsh. 440; 20 Am. Dec. 156; *Houston v. Gilbert*, 3 Brev. 63; 5 Am. Dec. 542; *Brown v. Frost*, 2 Bay, 126; 1 Am. Dec. 633; *Continental etc. Ins. Co. v. Yung*, 113 Ind. 159; 3 Am. St. Rep. 630. See the extended note to *Robertson v. Dodge*, 81 Am. Dec. 268.

ALLEN v. BUCHANAN.

[97 ALABAMA, 392.]

JURISDICTION—SUITS AFFECTING PROPERTY IN ANOTHER STATE.—Suit in equity may be maintained, and remedies granted which effect and operate upon the person of defendant, and not upon the subject matter when it is situated in another state or country, but the parties are within the jurisdiction of the court, although such subject matter is referred to in the decree, and the defendant is ordered to do, or to refrain from doing, certain acts towards it, and it is thus ultimately but indirectly effected by the relief granted.

EXEMPTIONS—INJUNCTION TO PROTECT PROPERTY IN ANOTHER STATE.—If a creditor and debtor are citizens of, and residents in, the same state, and the creditor institutes an action by attachment and garnishee proceedings in another state to reach property or credits due the debtor there, and exempt from legal process in the state where the parties are domiciled, such creditor may be enjoined from further prosecuting his action in the other state.

Lane and White, for the appellants.

Noble Smithson, for the appellee.

399 McCLELLAN, J. The bill in this case is filed by W. R. Buchanan, who is a resident citizen of Alabama, against Claude A. Allen, William Redd, and H. Lee Brown, who are also resident citizens of this state, doing business as partners under the firm name of Allen, Redd & Co., and against The Traders' Insurance Company of New Orleans, which is alleged to be a citizen of the state of Louisiana. Its purpose is to restrain the prosecution of a suit by said Allen, Redd & Co., in a civil court of the parish of Orleans, in the state of Louisiana, against the complainant, the object of which is to collect from said insurance company certain six hundred dollars, which said company owes complainant; the company being also before that court by process analogous to a summons in garnishment under our laws. The abstract equity of the present bill is rested on the fact that the fund thus sought to be subjected to the debt of Allen, Redd & Co., is exempted to the complainant under the laws of Alabama, where all the parties in interest reside, 400 and is so claimed in the bill; and it is moreover averred that prior to the institution of the proceeding in Louisiana, Allen, Redd & Co. sued Buchanan on the same cause of action in this state, and summoned said insurance company to answer whether and in what sum it was indebted to the defendant in that action, that the garnishee appeared and answered indebtedness in the sum of six

hundred dollars; that thereupon the defendant claimed the same as exempted to him, and that plaintiff having failed to contest said claim of exemption, the Birmingham city court, in which the case was pending, "adjudged that complainant was entitled to the amount so due as exempt, and discharged the same from said garnishment." This is the fund which is now involved in the proceeding in Louisiana.

It cannot be doubted that on the averments of the bill the complainant is legally and equitably entitled to the fund. Under the laws of Alabama he has the same right to demand and receive the sum due him from the insurance company, as against Allen, Redd & Co., as if they had no claim whatever against him. Nor is it material what effect, or whether any effect, is accorded to the judgment of the city court of Birmingham, discharging the garnishee and holding this money to be exempted to Buchanan, the defendant in that suit, and the complainant here. If there had been no previous suit involving the question of exemption, and no attempt to adjudicate that question in the courts of Alabama, the complainant, on the facts he avers, would be, and is still, entitled under our laws to this fund over any claim Allen, Redd & Co. can have to it if the averments of the bill as to complainant's not having waived his exemptions against their debt be true. And the case may in this respect stand, on the averments of the bill, on the claim of exemptions therein brought forward wholly regardless of whether any previous claim had been advanced and adjudged in favor of complainant or not: *Zellicker v. Brigham*, 74 Ala. 598.

Complainant's right to this money exists, however, only by force of the local law of Alabama, which has no extraterritorial operation, and which will not be enforced in courts of Louisiana. But the fact that this legal right of his cannot be asserted in the courts of that state, since one jurisdiction does not enforce the exemption statutes of another, so far from militating against the equity of this bill, is essentially the basis of its equity. It can make no difference as respects the abstract rights of these parties ⁴⁰¹ in and under the law of Alabama, whether they are cognizable by foreign courts or not. Whether so or not they are the same here, and the parties are the more entitled to have them declared and effectuated here, so far as our courts are capable of declaring and effectuating them, because they cannot be asserted in the foreign court which is undertaking to deal with the subject mat-

ter through its judgments *inter partes* regardless of the rights of the parties under the law. In other words, the complainant has a right to this money, which though it is a legal right, he cannot assert in the forum where the respondents are seeking to foreclose it, and where it will be foreclosed unless he can invoke the powers of the chancery court to restrain their efforts to that end. This being his only remedy to effectuate his legal rights, the demurrers to the bill which go upon the ground that complainant has an adequate remedy at law were properly overruled.

The main question presented on this appeal, however, is as to the power of the court of chancery of one state, having jurisdiction of the parties, to grant relief *inter partes* in respect of a matter which is situated beyond the territorial jurisdiction of the court, in another state or country. The authorities overwhelmingly support such jurisdiction. Mr. Pomeroy upon this subject says: "Where the subject matter is situated within another state or country, but the parties within the jurisdiction of the court, any suit may be maintained and remedy granted which directly effect and operate upon the person of the defendant and not upon the subject matter, although the subject matter is referred to in the decree, and the defendant is ordered to do, or to refrain from doing, certain acts toward it, and it is thus ultimately but indirectly effected by the relief granted. As examples of this rule, suits for the specific performance of contracts, for the enforcement of express or implied trusts, for relief on the ground of fraud, actual or constructive, for the final accounting and settlement of a partnership and the like, may be brought in any state where jurisdiction of the defendant's person is obtained, although the land or other subject matter is situated in another state or even in a foreign country": 3 Pomeroy's Equity Jurisprudence, sec. 1318. And Judge Story says: "In general, the fact that the property is not within the jurisdiction, constitutes no bar to a proceeding in the court of equity, if the person is within the jurisdiction; for a court of equity acts upon the person; or to use the appropriate phrase, *æquitas agit in personam*": Story's Equity Pleading, sec. 489. And to like effect are the following adjudged cases: *Penn v. Lord Baltimore*, 1 ⁴⁰² Ves. Sr. 444; *Guild v. Guild*, 16 Ala. 121; *McGee v. Sweeney*, 84 Cal. 100; *Montgomery v. United States*, 36 Fed. Rep. 4; *Davis v. Morriss*, 76 Va. 21; *Carver v. Peck*, 131 Mass. 292; *Bethell v. Bethell*, 92 Ind. 318; *Baker v. Rockabrand*, 118

Ill. 365; *Johnson v. Gibson*, 116 Ill. 294; *Poindexter v. Burwell*, 82 Va. 507, among many others cited in note to section 1318 of Pomeroy's Equity Jurisprudence.

And so long as the relief sought may be worked out directly on the person of the defendant and indirectly through his person on property in a foreign jurisdiction, it is immaterial what form the decree assumes, whether it is affirmative or negative in its effect, whether it commands an act to be done, as, for instance, the execution of a conveyance, or restrains the doing of an act, as, for instance, the alienation of property, the institution or prosecution of suits in other states, and the like. Thus it is said by Judge Story, after declaring that nothing can be clearer than the proposition that the courts of one country cannot exercise any control of those of another: "But the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their territorial limits. When, therefore, both parties to a suit in a foreign country are residents within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon these parties, and direct them by injunction to proceed no further in such suit. In such case these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject matter of the dispute, they consider the equities between the parties, and decree *in personam* according to those equities; and enforce obedience to their decrees by process *in personam*": 2 Story's Equity Jurisprudence, sec. 899. And the same doctrine is announced by Mr. High, who in conclusion says: "While, therefore, the court will assume no control over the course of the proceedings in the foreign tribunal, it may and will interfere to prevent those who are amenable to its own process from instituting or carrying on suits in other states which will result in injury and fraud. Thus, where a creditor and debtor are both citizens in, and residents of, the same state, and the creditor institutes an action of attachment and garnishee proceedings in another state to reach credits due the debtor there and which would have been exempt from attachment or legal process under the laws of the state where parties are domiciled (which is precisely the case at bar) the creditor may be enjoined ⁴⁰³ from further prosecuting his action in the foreign state, it being regarded

as an effort to evade the laws of his domicile": 1 High on Injunctions, secs. 103-107. These texts are amply sustained by the following cases, some of which are on all fours with this case in their facts, while the others are strictly analogous: *Keyser v. Rice*, 47 Md. 203; 28 Am. Rep. 448; *Snook v. Snelzer*, 25 Ohio St. 516; *Pickett v. Ferguson*, 45 Ark. 177; 55 Am. Rep. 545; *Great Falls Mfg. Co. v. Worster*, 23 N. H. 470; *Vermont etc. R. R. Co. v. Vermont Cent. R. R. Co.*, 46 Vt. 792; *Dehon v. Foster*, 4 Allen, 545; *Proctor v. National Bank*, 152 Mass. 223; *Cunningham v. Butler*, 142 Mass. 47; 56 Am. Rep. 657, and notes 663-665; *Wilson v. Joseph*, 107 Ind. 490.

Some decided cases maintain the contrary doctrine. Our attention has been called to three of these, namely: *Mead v. Merritt*, 2 Paige, 402; *Williams v. Ayrault*, 31 Barb. 364; and *Peck v. Jenness*, 7 How. 612. These cases appear to have followed the reasoning and judgment of Lord Eldon in *Kennedy v. Earl of Cassilis*, 2 Swanst. 313, which has ceased to be authority in England, the power of the chancery court to restrain persons of whom it has jurisdiction from the prosecution of suits in foreign countries being now recognized and established in that country: 1 High on Injunctions, sec. 103. Moreover, what was said by the supreme court of the United States in *Peck v. Jenness*, 7 How. 612, was a *dictum*, inasmuch as the lack of power in a federal court to restrain parties in the prosecution of suits in state courts, which was the question considered and decided, results from, and is properly ascribed in that case to, the provisions of the judiciary act of 1793 which expressly declares that a writ of injunction shall not be granted by a court of the United States to stay proceedings in any court of a state.

The general doctrine invoked in this case—that the courts of one state may enjoin parties personally within their jurisdiction from prosecuting suits in the courts of another state—is now fully recognized by the supreme court of the United States, and held to be constitutional: *Cole v. Cunningham*, 133 U. S. 107.

We hold in accord with the overwhelming weight of authority, and with what we regard as the sounder reasoning, that the chancery courts of this state have the power invoked by the present bill, and that the bill makes a proper case for its exercise.

The decree overruling the demurrer is affirmed.

JURISDICTION.—**SUITS AFFECTING PROPERTY IN ANOTHER STATE:** See *Sentis v. Ladew*, 140 N. Y. 463; 37 Am. St. Rep. 569, and note with the cases collected.

INJUNCTION TO RESTRAIN VIOLATION OF EXEMPTION LAW.—This question as discussed in the leading cases will be found treated in the extended note to *Mumper v. Wilson*, 2 Am. St. Rep. 242, and see also *Driggs' Bank v. Norwood*, 49 Ark. 136; 4 Am. St. Rep. 30, and note.

BARLOW v. DAHM.

[97 ALABAMA, 414.]

LANDLORD AND TENANT—PARTITION BY TENANT BASED ON ADVERSE TITLE.

A tenant in possession of land under a lease, who acquires an outstanding title to an undivided interest therein from a third person cannot maintain partition without having surrendered possession to the landlord.

Faith and Ervin, and R. P. Deshon, for the appellants.

Chamberlain and Richardson, for the appellees.

415 HARALSON, J. The complainants filed this bill on the first day of October, 1890, against John Dahm, Timothy Meaher, James K. and Augustus Meaher, for the sale for partition, of certain real estate described in the bill, alleging that they owned an undivided third interest therein, and the defendants the other two-thirds, as tenants in common, and that it could not be equitably divided in kind. Complainants claim to have derived title to their one-third undivided interest in said land, on the seventeenth day of May, 1890, by deed of conveyance from one Glennon and his wife.

The defendants answering the bill, claim that they, and those from whom they claim, have been in the open, notorious, and continuous adverse possession of said land, ever since 1847, claiming it as their own, and exercising acts of ownership over it; that the complainants knew that defendants were in the adverse possession of said land, claiming it as their own property, when they received said deed to an undivided third of it, from said Glennon and wife; that complainants were tenants of defendants, under a written lease, and have been paying their rents therefor, and they have never repudiated said tenancy, nor claimed as their own any portion of said land, but occupy the whole of it as tenants of defendants, and not otherwise, and have never surrendered, or offered to surrender, the possession of said property to defendants.

The proof shows that the complainants, Barlow & Co., rented and went into the possession of the whole of this land from defendants, or those under whom they claim, on the first day of August, 1883, by a written lease of that date, for the term of five years, from that date, to the 1st of August, 1888, at the annual renting, of one hundred and fifty dollars, payable quarterly, with the privilege of renewal of the lease for five years more, at the same rental, and that on the first day of August, 1888, according to the terms of said lease, complainants accepted a written renewal of said lease, on the same terms as before, for another period of five years, expiring on the first day of August, 1893, and had paid their rents up to the 1st of October, 1890, the end of the last quarter, and were in possession of the property.

After this bill was filed, these defendants commenced ejectment in the circuit court of Mobile county, against these complainants, Barlow & Co., to recover the possession ⁴¹⁶ of said land, which they then occupied under said lease from defendants—the contention being, on their part, that because complainants claimed to have purchased a part of the leasehold from a third person, during the continuance of their lease from defendants, in hostility, as defendants claimed, to their title, and had filed this bill while thus in possession, asking a sale of the property for partition between themselves and defendants, as tenants in common, they thereby repudiated and forfeited their lease, and defendants were entitled to recover the possession of the land. In that case, the defendants, complainants here, did not question the title to the plaintiffs—these defendants—to two-thirds of the land, but claimed that they had leased only two-thirds interest in it from the Meahers, from whom these defendants derive title, and that they had acquired the interest of the other cotenant of the Meahers. The case was decided in the circuit court against these defendants. On an appeal to this court, we held that these facts did not constitute a forfeiture of the lease, and that the payment and reception of the rent up to November 1, October 1, 1890, was a recognition of the lease and an admission of an existing tenancy, which precluded defendants from insisting, in that action, upon a forfeiture of the lease: *Dahm v. Barlow*, 93 Ala. 120.

Without going into the details of this case, and a discussion of the several assignments of error, we confine consideration of the cause to a single principle, which is decisive of

it, consistently with what we held in *Dahm v. Barlow*, 93 Ala. 120.

The only ground upon which complainants seek to maintain this bill is, that on the 17th of May, 1890, during the existence of their lease from defendants, and their possession under it, they acquired by purchase from a third person an undivided third interest in the land. Admitting that defendants own two-thirds of it, and asserting their own claim to a third interest therein, they file this bill for a sale of said land for partition, while still holding possession of the entire premises under their lease from the Meahers, without having surrendered the possession to their landlords. This, as tenants, they are not permitted to do. "The landlord can only be required to litigate title with his tenant, upon the vantage ground of possession": *Houston v. Farris*, 71 Ala. 570; *Caldwell v. Smith*, 77 Ala. 157; *Norwood v. Kirby*, 70 Ala. 397.

The decree of the chancellor is affirmed.

Affirmed.

LANDLORD AND TENANT—ESTOPPEL.—A tenant cannot be heard to deny the title of his landlord, nor can he rid himself of such relation without a complete surrender of the possession of the land: *Springs v. Schenck*, 99 N. C. 551; 6 Am. St. Rep. 552, and note. One entering under another as a tenant is estopped from disputing the latter's title while the possession continues: *Jackson v. Miller*, 6 Wend. 228; 21 Am. Dec. 316. A tenant must deliver up possession to the landlord before he can assert an outstanding title, or one purchased by him: *Blake v. Howe*, 1 Aikens, 306; 15 Am. Dec. 681; *Brown v. Keller*, 32 Ill. 151; 83 Am. Dec. 258, and note; *Bailey v. Kilbourn*, 10 Met. 176; 43 Am. Dec. 423, and note. See the notes to *Camley v. Stanfield*, 60 Am. Dec. 222; *Jackson v. Davis*, 15 Am. Dec. 460; and *Camp v. Camp*, 13 Am. Dec. 68.

FALLS v. UNITED STATES SAVINGS, LOAN, AND BUILDING COMPANY.

[97 ALABAMA, 417.]

STATUTES OF SISTER STATE, PROOF OF.—The statutes of another state printed in compiled form by authority of a statute thereof are admissible in evidence without further proof, though published by a private person under authority of such statute.

CORPORATIONS—PROOF OF INCORPORATION.—In an action by a foreign corporation to foreclose a mortgage showing on its face that the plaintiff is a corporation, proof of its incorporation is dispensed with, and error in receiving in evidence a defective copy of its charter of incorporation is immaterial.

CORPORATIONS—ESTOPPEL TO DENY EXISTENCE OF.—In an action by a foreign corporation to foreclose a mortgage showing on its face that it is

payable to a corporation, the mortgagor is estopped from denying the corporate capacity of the mortgagee.

CONTRACTS—CONFLICT OF LAWS.—The law of the place where the contract is made is a part thereof, and determines the measure of right it secures subject to the limitation that no state enforces contracts entered into in another state or country, if such enforcement involves a breach of legal or moral right as maintained in the law of the forum.

FOREIGN CORPORATIONS—CONFLICT OF LAWS.—A corporation which performs corporate acts in a state other than its domicile, and seeks to enforce rights there, can exercise no exceptional rights and privileges which are conferred by the law of its creation if such enforcement involves a breach of the public policy or statutory system of the state where such rights are sought to be enforced. One state cannot confer rights and authorize their exercise beyond its own boundaries, unless they are in harmony with the general policy of the state in which the exercise is attempted.

FOREIGN CORPORATIONS—CONFLICT OF LAWS.—The power of a corporation to act in a foreign country or another state depends upon the law of the country of its creation, and on the law of the place where it assumes to act. It has only such powers as were given to it by the authority which created it, and it cannot do any act by virtue of those powers in any country or state where the laws forbid it so to act.

STATUTES—EXTRATERRITORIAL OPERATION OF.—The laws of a state can have no force *proprio vigore* outside of that state.

CORPORATIONS—CONFLICT OF LAWS—USURY.—Though a corporation is expressly authorized by its charter to charge a certain rate of interest upon its loans, it is not permitted to charge the same rate in a foreign state, if that is contrary to the usury laws there in force.

USURY—CONFLICT OF LAWS.—A contract entered into in Alabama with a foreign loan association, by which the borrower, who does not share in the profits or assets of the corporation and has no voice in its government, agrees in effect to pay interest greatly in excess of eight per cent per annum is usurious in Alabama, and can be enforced there only as to the principal, although such contract is not usurious under the law of the state where such association was created.

CONFLICT OF LAWS—CONSTRUCTION OF CONTRACT.—Though a mortgage given by a citizen of Alabama to secure a loan in a foreign loan association stipulates that it is made under and with reference to the laws of the state where such association was created, yet if the loan was negotiated and the mortgage executed in Alabama, it is an Alabama contract governed by the law of that state.

MARRIED WOMAN'S CONTRACT.—A mortgage executed by a wife with her husband's assent as security for a loan used by her to redeem land in which she has a right of redemption is the contract of the wife, and not a loan to the husband.

CONFLICT OF LAWS.—ACT OF BECOMING STOCKHOLDER IN FOREIGN CORPORATION is deemed as done in the state where the corporation was created and has its domicile, and the amount chargeable as a membership fee is governed by the laws of that state.

USURY—CONSTRUCTION OF CONTRACT.—In determining whether a contract is infected with usury, its substance and effect, not its form, are material. The intent to take or reserve more than lawful interest for a loan of money or the forbearance of a debt must exist, and this is deduced

from the relations of the parties, their acts contemporaneous with, or subsequent to, the contract and all attendant circumstances. When this intent exists and such is the substance and effect of the contract, no form or covering which may be given it, no device or shift can sustain it.

BILL filed by the appellee to foreclose a mortgage executed by Mattie D. Falls, a married woman, to secure a note worded as follows:

“\$10,000.

ST. PAUL, MINN., May 10th, 1890.

“For value received, after three years from date, and before nine years from date, we promise to pay to the order of the United States Savings, Loan, and Building Company, at the office of its treasurer, St. Paul, or to its trustee in Minneapolis, Minnesota, the sum of ten thousand dollars, with interest at the rate of six per cent per annum on the sum of ten thousand dollars, payable monthly. It is understood that this note is given for a loan obtained on two hundred shares of stock of said United States Savings, Loan, and Building Company, and if the maker hereof fails to make any monthly payment on said stock, or to pay any installment of interest for a period of three months after the same is due, then the whole amount of this note shall become due and payable, but if the maker hereof shall pay all installments of interest which become due hereon, and all monthly payments and fines which become due on said stock until said monthly payments shall have been past due for a period of six months, then upon the surrender of said stock to said company this note shall be deemed to be fully paid and canceled. This note is understood to be made with reference to, and under the laws of, the state of Minnesota.

[SIGNED] MATTIE D. FALLS.
HARRY J. FALLS.”

The mortgage contained a provision similar to the last clause in such note, and also provided that it might be foreclosed, unless the interest on the ten thousand dollars was paid monthly, together with all fines and assessments, and it also provided for two hundred dollars attorney's fee, for foreclosing the mortgage. The charter and by-laws of the association were made exhibits to the bill. Mrs. Falls and her husband answered jointly denying the existence of the appellee as a corporation, or that it could lawfully do business. The answer also alleged that the debt was contracted by the husband, and that the wife was merely a surety;

that defendants resided in Alabama, the mortgaged property was located there, and that the entire transaction was negotiated, and concluded in that state; that the effort made by the bill to locate the transaction in Minnesota was intended as a device to cover the usury in the transaction, which usury constitutes a defense. A separate answer afterwards filed by Mrs. Falls, set up the same defenses and prayed that the mortgage be canceled as a cloud on her title. The whole transaction was negotiated and the mortgage was executed in Alabama, and the mortgaged property was located there, and the money loaned was paid to the husband of Mrs. Falls. The mortgaged property had been purchased by the husband of Mrs. Falls from one Reed, and a mortgage securing the purchase money to Reed had been transferred to one Letchford. Falls conveyed the property to Mrs. Falls, and Letchford afterwards foreclosed the mortgage, making Mr. and Mrs. Falls parties, and purchased the property at foreclosure sale. The money obtained by the loan in suit was used to redeem the property from Letchford, who executed a deed to Mrs. Falls.

R. H. Pearson and John Vary, for the appellant.

J. M. McMaster, for the appellee.

420 **STONE, C. J.** In the code of 1886, section 2790, is this language: "The proceedings of any legislative body purporting on the face of the book to be printed by authority of the government, state, or territory, are evidence without further proof." A book published in St. Paul, Minnesota, in 1879, was offered in evidence to prove the statute law of that state. It was objected to. The title page of the book has these words: "The General Statutes of the State of Minnesota . . . prepared by George B. Young." Immediately succeeding the foregoing statement is found the following: "Edited and published under the authority of chapter 67 of the laws of 1878 and chapter 67 of the laws of 1879." These statutes are printed in full on the second leaf of the book. Chapter 67 of the statutes of 1878 declares that "The said statutes shall be compiled and published by a commission consisting of George B. Young and such others as he may associate with him, under the supervision and direction of the Governor." Chapter 67 of the statutes of 1879 provides that "The edition of the general statutes and other public laws of this state in force at the close of the legislative session of eighteen hundred

and seventy-eight (1878), prepared by George B. Young, pursuant to chapter sixty-seven (67) of the general laws of eighteen hundred and seventy-eight (1878), shall be competent evidence of the several acts and resolutions therein contained, in all courts of this state, without further proof or authentication." It is difficult to conceive of language which would more clearly express the fact that ⁴²¹ the laws found in said book were printed by authority of the state, than is here shown. Our statute does not require that the state shall be the publisher. That it is done with its authority is enough: *Clanton v. Barnes*, 50 Ala. 260; *Bradley v. Northern Bank*, 60 Ala. 252. There is nothing in this exception.

There is, if possible, less merit in the objection to the introduction in evidence of the Minnesota compilation of statutes published in 1891, so far as those statutes can be considered in this case. See the certificates in the first of the volume, made by the secretary of state and state librarian, and see section 261 of the book itself.

The real transaction in this case was a loan of money by a Minnesota corporation—the United States Savings, Loan, and Building Company—to Mrs. Falls. And the negotiation and agreed contract were conducted and consummated in Alabama. The corporation had a place of business in Birmingham, Alabama, and had an agent thereat. It had complied with our constitutional and statutory provisions: Const., art. 14, sec. 4; Sess. Acts, 1886, 1887, 102. This compliance gave it a constitutional and legal right to transact business in Alabama.

An objection was reserved to the action of the city court in receiving in evidence what purports to be a certified copy of the act and proceedings by which appellee was incorporated. The precise objection is, that the authentication is not a compliance with legal requirements. We hold it to be unnecessary to decide this question. That the appellant executed the note and mortgage, the collection of which by foreclosure is the purpose of this suit, is fully shown, and nowhere denied. We hold that the mortgage shows on its face that the United States Savings, Loan, and Building Company is a corporation. This is shown in very many of its recitals, and this dispensed with all proof of its incorporation. So, whether the transcript was properly authenticated or not was immaterial. Mrs. Falls had admitted complainant's corporate character by the execution of the mortgage: 1 Morawetz on Private

Corporations, sec. 39; 2 Morawetz on Private Corporations, 592, 774.

Each separate government or state has its own legislative system and policy; and, in determining and enforcing rights which originate out of our jurisdiction, comity requires that we shall admeasure the redress by the yardstick of the place where the right accrued. In entering into contracts, if nothing appear to the contrary, the law of the place silently becomes a part of the contract, and determines the measure of right it secures. This right by comity, however, ⁴²² has limitations. No state will enforce contracts or redress grievances entered into, or suffered, in another state or foreign country, if the enforcement involve a breach of legal or moral right as maintained in the law of the forum.

When a corporation of foreign creation not only attempts to enforce rights before our tribunals, but goes farther and actually performs corporate acts within our jurisdiction, it can claim and exercise no exceptional rights or privileges which may have been conferred by the law of its creation, if such enforcement involves a breach of our own public policy, or statutory system. The legislature of one state cannot confer rights, and authorize their exercise beyond its own boundaries, unless they be in harmony with the general policy of the state or country in which the exercise is attempted. "The power of a corporation to act in a foreign country depends both upon the law of the country where it was created and on the law of the country where it assumes to act. It has only such powers as were given to it by the authority which created it. It cannot do any act by virtue of those powers in any country where the laws forbid it so to act. It follows that every country may impose conditions and restrictions upon foreign corporations which transact business within its limits": Story's Conflict of Laws, 8th ed., sec. 106, note a. In 2 Morawetz on Private Corporations, section 959, is this language: "It is a fundamental principle that the laws of a state can have no binding force, *proprio vigore*, outside of the territorial limits and jurisdiction of the state enacting them." And in section 964 the same author says: "It has been held that, although a corporation be expressly authorized by its charter to charge a certain rate of interest upon its loans, it will nevertheless not be permitted to charge the same rate in a foreign state, if that would be contrary to the usury laws there in force." And in section 965 this author says:

"Foreign corporations have no right by the law of comity to do acts within a state which are prohibited by the laws of that state to its own citizens or corporations engaged in a similar business."

It is not our intention to determine in this case whether a building and loan association, incorporated and doing business in Alabama, can contract for and recover a greater rate of interest than 8 per cent per annum. See our statutory system, commencing with section 1553 of the code of 1886. What we do decide is, that the statutes of Minnesota have no binding force with us; and any provision found in them which authorized a corporation of their creation to contract for and recover more than 8 per cent for the loan ⁴²³ or forbearance of money is obnoxious to our statute enacted for the prevention of usury. We hold further that the contract which gave rise to the present suit is an Alabama contract, and can only be enforced to the extent our statutes permit. Any statute of this state which may be supposed to confer on building and loan associations the right to charge more than 8 per cent interest, even if we concede such statutory authority, must be confined in its operation to such corporations as are chartered in Alabama. It cannot be supposed that our legislation had a greater purpose or intent than this.

We have made no accurate calculation, and hence cannot declare the precise rate of interest Mrs. Falls would be required to pay if she were to comply with the letter of her contract. It is greatly in excess of eight per cent per annum. The plea of usury is very fully sustained. With us, however, usury is only a partial defense. It extends only to a denial of all interest, when the party contracting to receive usury is the complainant. The rule in chancery is different from that which prevails at common law: *Dawson v. Burrus*, 73 Ala. 111; *Uhlfelder v. Carter*, 64 Ala. 527.

Several other defenses were urged in this case which we consider untenable. This was in no sense a loan of money to the husband. The loan was to Mrs. Falls, and we think there is nothing in any of the objections urged save the single one of usury. That, with us, is only a partial defense.

A single feature of the controversy before us, we think, must be governed by the laws of Minnesota. The United States Savings, Loan, and Building Company was incorporated under the laws of Minnesota, and has its business domicile in that state. The first step taken by Mrs. Falls was to consti-

tute herself a stockholder in that corporation. This act must be considered as having been performed in Minnesota and as governed by the laws of that state. Under their system, corporations, in forming, are permitted to charge a graduated membership fee. In the case before us it amounted to \$155. We hold that this fee, together with the agreed attorney's charge of \$200 for foreclosing the mortgage, is collectible. The latter—the attorney's fee of \$200—is expressly provided for in the mortgage. No question is raised upon its reasonableness, and we feel no hesitancy in holding that this item was properly allowed to complainant.

Mrs. Falls did not receive the full \$10,000, the amount of the agreed loan. Three monthly installments were retained, amounting to \$510. Also the membership fee, \$155, was ~~also~~ withheld. The latter rightfully, as we think, and she is entitled to no credit for that. What she actually owes is \$9,490 plus \$200, attorney's fee for foreclosing the mortgage.

The decree of the chancellor is reversed and a decree here rendered that the complainant, instead of the sum of \$12,638 recovered in the court below, have and recover of appellant \$9,490 and other \$200 attorney's fee, with a lien, and to be enforced as directed in the decree of the chancellor. Let the costs of appeal be paid by the appellee.

Reversed and remanded.

STONE, C. J. Since the opinion in this case was delivered November 25, 1892, an elaborate and earnest argument has been submitted by appellee asking a reconsideration of that decision. One position assumed and pressed with great zeal is, that the contract under consideration is not tainted with usury, even assuming it to be governed by the statutes of Alabama. The precise argument used in this connection is, that the payments stipulated to be made monthly by Mrs. Falls, other than those which are, in the very terms of the by-laws and contract, called interest, are not payments on the debt contracted, but calls or installments paid on the shares of stock subscribed for. If this position be sound, the interest actually collected is only one-half of one per cent per month, equal to six per cent per annum, and hence not usurious.

The corporate powers, by-laws, and methods of doing business which pertain to the United States Savings, Loan, and Building Association are set forth in the transcript before us.

We will briefly sketch what we understand to be the main features of its plan of operations so far as it is necessary to a proper understanding of this case.

The authorized capital of the corporation was and is ten millions of dollars. It is divided into shares valued at one hundred dollars each. Unlike most money corporations, the capital stock is not required to be paid in at or within a short time after organization with a view of supplying a fixed security for creditors. On the contrary, the shares are paid for in monthly installments, aggregating seven and twenty one-hundredths per cent during the year, or six and ten one-hundredths of one per cent per month. Paid at this rate, and without other resource, the entire capital stock will be paid in a fraction under fourteen years. This is the rate to non-borrowers, called investors.

The business of the corporation is lending its money, and its chief loans are made on real security, appraised and valued at double the amount of the loan. The monthly installments ⁴²⁵ paid in, less ten per cent thereof reserved to defray the expense of administering the corporation, supplemented with the monthly payments of interest, constitute the operating capital of the corporation, on which it conducts its business of lending money. These loans are made monthly, and consequently the funds are kept employed and interest-bearing.

What are denominated shareholders are divided into two classes: those who borrow from the corporation, and those who do not. To obtain a loan from the corporation, the applicant must first become a shareholder, paying for the privilege a small, graduated membership fee, of one and a half dollars per share, down to seventy-five cents. After paying three monthly installments, he may apply for and obtain a loan on the following terms and conditions:

1. The applicant must first obtain the requisite shares of stock; and for this service he must subscribe for double the number of shares, which would be requisite to make up the sum proposed to be borrowed, rating shares at their full matured value of one hundred dollars each. So in borrowing \$10,000—the sum borrowed in this case—the borrower must subscribe for 200 shares. That was done in this case.

2. The applicant must also have paid three monthly installments of sixty cents per share, and three months interest on the sum proposed to be borrowed at 6 per cent interest. These sums which were required to be prepaid in

this case amount to \$510; being for installments \$360, and for interest, \$150. So the borrower actually obtained only \$9,490.

3. The borrower, before obtaining the loan, was required and did bid one hundred of his subscribed shares, to be surrendered to the company as a bonus for the privilege and personal favor of being allowed to become a borrower; but monthly installments exacted from shareholders of sixty cents per month were still required to be paid by the borrower on the entire number of subscribed shares, including the one hundred surrendered as a bonus. So, the borrower is required to pay, and did bind herself to pay, in this case, double the sum of the installments required of non-borrowers—equal to one-seventh of the sum borrowed. These payments, unaided, if credited without discount or diminution would mature the stock and extinguish the debt in seven years.

4. The borrower was required to mortgage, and did mortgage, real estate appraised at \$20,000, to secure the payment of the monthly installments and interest until the sum borrowed ~~426~~ should be repaid, after deducting from all installments paid a sum to cover the corporation expenses.

5. In addition to this mortgage security the borrower was also required to pledge, and did pledge, for the repayment of the money borrowed, her remaining 100 shares of stock which had been made the basis of the loan.

6. Notwithstanding the installments required to be paid monthly, which in the course of the year amounted, in addition to interest paid during the year, to a fraction over fourteen per cent of the principal of the money borrowed—the sum of the year's installments paid on the principal of the debt being one-seventh thereof—this did not diminish the sum of the interest required to be paid each year, so long as any portion of the money borrowed remained unpaid. Thus: The sum borrowed in this case was \$10,000. The agreed interest on this was six per cent, equal to \$600 for the first year. But the payment of this same sum of \$600 interest was to be kept up so long as any of the principal debt remained unpaid. Even when the principal of the debt became reduced by installments paid to one-seventh of the original sum borrowed, the rules of the company and the contract in this case required the borrower to pay the same agreed amount of

interest—\$600—for the forbearance of the remaining one-seventh of the debt for one year.

The borrowers must first become shareholders. In what sense do they become such? They acquire none of the privileges or rights of shareholders, in the ordinary sense of that term. They receive no dividends, and have no share in the profits of the enterprise. When they repay the money borrowed, according to the terms of the loan, they receive no certificate of stock, and when the business of the corporation is wound up, they have neither part nor lot in its profits or accumulations. On the contrary, when the principal debt is extinguished by the payment of the monthly installments demanded, and the fixed, unchanging sum of agreed, so-called interest, is paid up to, and including, the time when the installments extinguish the principal debt, then their connection with, and interest in, the enterprise ceases. Not by the receipt, or retention of a certificate of stock. Not by any participation, or right to participate in the profits or accumulations of the adventure. It ceases by a cancellation of the so-called certificates of stock, and a final severance of the borrower's connection with the corporation. By the very terms of the note and mortgage the borrower is required to make the agreed monthly payments ⁴²⁷ of installments and interest, "until said stock becomes fully paid in, and of the value of \$100 per share, . . . and shall then surrender said stock to said company in payment of said note." These are the terms the contract imposes on the borrower—these the conditions on which she can obtain a release of her lands from the mortgage lien. When these terms are complied with (and of course not till then), "this deed [the mortgage] shall be null and void, otherwise to remain in full force and effect." It is nowhere said that the borrower shall share in the profits or assets of the association; the very language of the note and mortgage as copied repels such interpretation.

Can it with any propriety be said that persons filling the relations we have been describing ever become shareholders in the corporation? They acquire none of the rights which attach to that relation. Are they not simply borrowers of money; and is not all else simply machinery to bring about that end; useless machinery, save that it may furnish excuse for demanding of the borrower a membership fee, and that he shall contribute to the expense fund of the corporation's administration? The corporation is also empowered to im-

pose, and does impose, penalties and forfeitures for delays and defaults in the payment of installments and interest. Such imposed penalties are found in the transcript before us.

Being practically a loan of money, was the loan in the present case an agreement to demand and pay a greater rate of interest than eight per cent per annum—the lawful interest of the state of Alabama? We employ the word “agreement” intentionally; for, to be usurious, the contract itself must stipulate for interest above the lawful rate.

We have been referred to two calculations, with the view of convincing us that the interest stipulated to be paid in this case is not usurious on its face. One of those calculations is shown in the deposition of the witness, Douglas, found in the transcript before us. The other is seen in the report of the case of *Thompson v. Gillison*, 28 S. C. 534. In each of those instances the calculator was betrayed into the same oversight or error. Each allowed to the lender the same sum as interest for each of the years the loan was permitted to run, as if the principal, or interest-bearing fund, had remained undiminished during the whole term of the loan. Had that been the case, in other words, if the borrower had paid only the interest during the intervening years, and had left the principal intact until the final settlement, and then paid the entire principal ⁴²⁸ at one time, their calculations would stand vindicated. This, because in such case the interest-bearing fund would remain the same during the entire period of the loan. But they were not dealing with such facts. The problem they were handling was like the one we have in hand; the principal, or interest-bearing debt, was being reduced, say, one-seventh each year.

We have made many calculations, and have, in that way, demonstrated the correctness of the proposition that, by the very terms of the contract Mrs. Falls made with the United States Savings, Loan, and Building Association, she bound herself to pay interest, and to pay it monthly, at a rate greatly in excess of six per cent per annum, and very materially in excess of eight per cent per annum. Let us state the account on the facts of the case we have in hand.

Computing the several payments of the principal debt required to be made during each year as aggregating one-seventh of the debt, the whole debt will necessarily become extinguished in seven years. In this we do not compute the sums paid as interest, but include only the excess of the sev-

eral payments over and above interest. Thus, the sum of the amount of the loan being \$10,000, it necessarily follows that for the first year the interest-bearing debt must be \$10,000.

But, the principal, or interest-bearing debt being reduced one-seventh by payments during the first year, it follows that the sum of the debt left unpaid for the computation of interest for the second year will be only six-sevenths of \$10,000. And so the process of reduction of the interest-bearing debt will go on at the rate of one-seventh each year. For the seventh year the principal on which interest is to be computed will be only one-seventh of \$10,000; a fraction over \$1,428. Six per cent interest paid at the fixed, unchanging sum of \$600 per annum for these seven years will aggregate \$4,200. Calculated on the balances left after the several yearly payments are deducted, the sum of the several payments of interest will amount to \$2,400, or four-sevenths of \$4,200. This shows an excess of interest stipulated to be paid during the seven years of \$1,800, if we compute interest at six per cent per annum. If the unchanging sum of \$600, stipulated to be paid during each year—aggregating \$4,200 during the seven years—be in fact paid, the borrower, instead of paying six per cent for the forbearance of the money, will, in fact, have paid at the average rate of $10\frac{1}{2}$ per cent per annum. And this excess of interest Mrs. Falls bound herself to pay by the very terms of the contract she entered into.

429 The contract requires Mrs. Falls to pay \$170 per month, equal to \$2,040 during each year. In the calculations we submit we treat these payments as if made in gross at the end of each year. Treating them thus, and computing interest only on the balances left after the annual payments, the following results are shown:

1. At 6 per cent interest the debt of \$10,000 will be entirely extinguished, principal and interest, by these annual payments of \$2,040, in a fraction less than six years; and in so paying, the entire interest paid by the borrower will amount to a fraction less than \$2,200. Paid at the agreed rate of \$600 for each of the six years, it would amount to \$3,600.

2. At 8 per cent interest, the same annual payment of \$2,040 would extinguish the debt, principal and interest, in something less than six and a half years, while the sum of all the interest paid would be \$3,178. Paid on the basis of the contract at the gross sum of \$800 per year, it would amount

to \$5,200. We might give other examples by way of illustration, but we think these sufficient.

It will be observed that in making our calculations we have assumed that the borrower received the full \$10,000. She actually received only \$9,490. And we have pretermitted all consideration of the membership fee she was required to pay, and her share of the operative expenses of the corporation, which the rules of the association hold her liable for. We have likewise taken no account of the fact that the interest was made payable monthly. These items brought into the account would materially swell the burden the contract imposes on the borrower.

If further proof be required to show the contract we are considering is usurious in its terms, it is furnished in the decree the chancellor rendered in this cause. No one contends that in rendering his decree he went beyond the letter of the contract he was construing. Yet, although the decree was rendered less than two years after the money was borrowed, the \$10,000 had increased to \$12,638; and of this sum only \$440 was for fines assessed for nonpayment of monthly installments and interest. This taken from the \$12,638 leaves about \$2,200 of interest and charges for the use of \$10,000 from the date of the contract—May 10, 1890—to the date of the decree—March 10, 1892. This accorded to complainant about one per cent interest per month, or 12 per cent per annum.

The other class of shareholders are non-borrowers, sometimes called investors. The monthly installments required ⁴⁵⁰ of these is just one-half of the sum required of the borrowers, being 1-14 of the value of their stock, and they pay no interest. They have no shares required to be surrendered as a bonus or premium; no dead shares. They pay installments only on the shares they own, and acquire all the rights of shareholders or stockholders in the corporation to the extent of the stock they subscribe for. They have a voice in the government of the corporation, and share in its dividends and other accumulated assets. They share ratably in all the excess of interest paid by the borrowers, and in this way realize more than lawful interest on their investment. Under all the calculations, the shares of the investors mature in about seven years up to the full \$100 per share. These are shareholders in fact and in law, for they have all the powers and rights of shareholders in corporations.

No one will dispute that the investors realize more than lawful interest. Whence comes the fund from which this excess of interest is realized? It must come from the borrowers, for there is no other source from which it can be derived. To secure to one class unlawful interest while none of the shareholders pay in excess of the lawful rate is a physical impossibility. The consequence is that their shares will have matured unto their full value of \$100 per share, while they have paid out but little, if any, over half that sum, and have lain out of the use of their money for a time which averages only three and a half years, or four at most. So the non-borrower realizes a much higher rate of usurious interest than the borrower pays. This, because there are many more borrowers who pay usurious interest than there are investors who divide that usury between them.

We have said this was practically a loan of money. Stripped of all mere formal accompaniments, we are not able to discover any material connection Mrs. Falls ever had with the corporation, other than as a borrower of money. She had no voice in its government, no share in its profits or assets. In determining the character of any given transaction, the law regards the substance, not the form it is made to assume. In *Uhlfelder v. Carter*, 64 Ala. 527, this court said: "In determining whether a contract is infected with usury, its substance and effect, not its form, are material. The intent to take or reserve more than lawful interest for the loan of money or the forbearance of a debt must exist; and this is deduced from the relations of the parties, their acts contemporaneous with or subsequent to the contract, and all attendant circumstances. When this intent exists, and such ⁴³¹ is the substance and effect of the contract, no form or covering which may be given to it—no device or shift—can sustain it. A simple loan, or the mere forbearance of an existing debt, which with the lawful interest is not put at hazard, but is certainly to be paid, will become usurious, by ingrafting upon it stipulations intended for the additional profit of the creditor, and not as compensation for loss or inconvenience he may bear."

Our calculations and argument are based, not on contingent or possible losses the association may suffer in its administration. We have considered the questions on a basis the most favorable and successful that could possibly attend the enterprise, even if every borrower meets his contractual en-

gements punctually, and every installment is paid on the day it matures. We have allowed to the borrower full credit for the entire sum of the installments he is required to pay, without deduction of any thing therefrom to meet corporation, or other expenses or losses. And we have shown that with these most favorable, possible results (we may say impossible) the borrower is bound, by the very letter of the contract, to pay a rate of interest greatly in excess of 8 per cent per annum. And it is of no moment that no witness testifies that the interest is usurious. The corporate powers, the by-laws and the contract are shown in the transcript, and these furnish the evidence—the indisputable evidence—that the rate of interest required and contracted to be paid is manifestly in excess of 8 per cent. The question is simply one of arithmetical calculation; and the laws of arithmetic are judicially taken notice of. And the excess is so obvious, that it is impossible to suppose it was not intended.

The excess of interest, noted above, is one of the fixed, certain terms of the contract by which the money was lent, and which Mrs. Falls, in obtaining the loan, bound herself to pay. No ingenuity can infuse any element of contingency or uncertainty into her contractual obligation to pay up to this point. Beyond this, however, there is an uncertain liability, namely: It cannot, from any thing shown to us, be certainly known how much she may be required to pay beyond the sums shown in our calculations. Enough for us that the contract itself requires the borrower to pay more than lawful interest.

But there was another reason operating upon the writer of this opinion which induced him to request a recall of the certificate of reversal, and a further consideration of the case. He had come to doubt the correctness of the conclusion announced, ⁴³² that, in determining the question of usury, we must be governed by the Alabama statutes.

The facts shown by the record are as follows: "The United States Savings, Loan, and Building Company is a private corporation, incorporated under the laws of Minnesota, located and doing business in the city of St. Paul, of that state. One of its purposes is the loan of money on long time, secured by mortgage on real estate, the accruing interest and partial installments of the principal to be paid monthly. True, they are not, in the books of the corporation, or in the contract of the parties, called installments of the debt, but monthly pay-

ments on the capital stock. We think, however, that this is a misnomer; for we cannot perceive that the borrower on subscribed shares ever becomes a stockholder in fact. He acquires none of the rights or powers of a stockholder; as that term is generally understood and applied.

The negotiation for a loan was entered upon in Birmingham, Alabama. That negotiation was conducted by the husband of Mrs. Falls representing her, and a soliciting agent representing the corporation. As I understand the record, the following comprises substantially what was done in Alabama: The soliciting agent furnished the information and the blanks necessary to be filled out and signed, in order to make the application in proper form to obtain membership and the loan, and probably filled those blanks, and forwarded the application. It is probable that he also represented the corporation in having the abstract of title prepared, a valuation made of the property offered as security, and the preparation of the note and mortgage, to be executed by the applicant. All these acts, however, were provisory. They were but an offer. It is not only not shown that the soliciting agent entered into any binding contract that the company would accept the offer and lend the money, but the converse of this proposition is established. Not until the proposition was considered at the home office, not until the papers were examined and the offer accepted, was any contract made which would bind the company. Not until then could Mrs. Falls have maintained an action for a breach of contract, if the company had refused to advance the money; for no contract had been concluded. Such is the unmistakable language of the record: *Derrick v. Monette*, 73 Ala. 75; 3 Brickell's Digest, 361, sec. 426; Wharton on Conflict of Laws, sec. 421. When Mrs. Falls' proposition was accepted, a check for the money was issued by the proper officer of the United States Savings, Loan, and Building Company, in St. Paul, Minnesota, payable to the order of Mrs. Falls. That ⁴³³ check was drawn on the Minnesota Loan and Trust Company, the building and loan company's trustee, having its business habitation in Minneapolis, Minnesota. True, that check was cashed at a bank in Birmingham, Alabama, but there is nothing unusual in that; and it is not shown that the building and loan company had any agency in procuring that to be done, even if we concede such agency would affect the question. The note given by Mrs. Falls and her husband, although signed in Birmingham, Alabama, is

made payable "to the order of the United States Savings, Loan, and Building Company at the office of the treasurer, St. Paul, or to its trustee in Minneapolis, Minnesota. . . . This note is understood to be made with reference to, and under the laws of, the state of Minnesota." The mortgage also stipulates that the money is to be paid "at the office of (the company's) treasurer at St. Paul, Minnesota, or at the office of its trustee, Minneapolis, Minnesota; and it also contains the clause, "This mortgage is understood to be made with reference to, and under the laws of, the state of Minnesota." So I repeat no binding contract was agreed on, or concluded in Alabama.

That justly celebrated jurist, Chancellor Kent, 2 Kent's Commentaries, 459, employed this language: "If a contract be made under one government, and is to be performed under another, and the parties had in view the laws of such other country in reference to the execution of the contract, the general rule is that the contract, in respect to its construction and force, is to be governed by the law of the country or state in which it is to be executed; and the foreign law is in such cases adopted, and effect given to it."

In Story on Conflict of Laws, section 280, it is said: "Where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance."

In Third American and English Encyclopedia of Law, 543, 544, the principle is thus expressed: "As a general rule the validity of a contract is to be determined by the law of the place where it is made, unless it appears on its face that it was to be performed or was made in reference to the laws of some other place, in which case it will be governed by the laws of the place of the performance." Each of these standard works has abundant citations of authorities: See, also, *Hunt v. Hall*, 37 Ala. 702; *Cubbedge v. Napier*, 62 Ala. 518; Boone on Mortgages, sec. 86; *Hanrick v. Andrews*, 9 Port. 9; *De Wolf v. Johnson*, 10 Wheat. 367; *Cromwell v. County of Sac*, 96 U. S. 51; ⁴²⁴ *Peyton v. Heinekin*, 131 U. S. App. 101; *Dolman v. Cook*, 14 N. J. Eq. 56; *Goodrich v. Williams*, 50 Ga. 425.

I am aware that artifice is sometimes resorted to in making contracts, with a view of evading the laws against usury.

To this end a false or fictitious place of performance is sometimes inserted in the writing. Whenever such attempt is made to appear, the courts refuse to lend their sanction to it. If such was the intention in this case, it has not been shown. I feel forced by the authorities to hold that in the matter of collectible interest under this contract, the laws of Minnesota must govern.

It is not my intention to disturb our former rulings as to the law which should govern this contract. On that question I think the present case clearly distinguishable from any we have heretofore decided, in two particulars: 1. The final agreement of the parties—the closing of the bargain—was consummated in Minnesota, and the money borrowed was promised to be repaid there; 2. It is one of the express terms of the contract that it is “made with reference to and under the laws of Minnesota.” This provision, standing alone, would not be decisive, for it might be prostituted to improper uses. Taken in connection with the facts of this case, I think it supports the conclusion I have reached. I repeat, it is not my intention to overturn our former rulings: *Farrior v. New England Mortgage Security Co.*, 88 Ala. 275; *American Freehold Land Mortgage Co. v. Sewell*, 92 Ala. 163; *Evans v. Kittrell*, 33 Ala. 449.

The foregoing is only my own opinion, formed alone on what is shown in the transcript. My brothers, however, differ with me, and adhere to the first opinion. The result is, that the application for a reversal of the former ruling is denied.

CORPORATIONS—PROOF OF INCORPORATION.—The existence of a corporation is established *prima facie* by evidence tending to show that it transacted business as such, and that all the witnesses speak of it as a corporation: *People v. Formosa*, 131 N. Y. 478; 27 Am. St. Rep. 612, and note. When to an action by a corporation the plea of *null tiel* corporation is interposed, the burden is on the plaintiff to prove its corporate existence by producing its charter or articles of incorporation, or by some admission on the part of the defendant, or by showing a state of facts which will operate as an estoppel: *Schloss v. Montgomery Trade Co.*, 87 Ala. 411; 13 Am. St. Rep. 51, and note.

CORPORATIONS—ESTOPPEL TO DENY CORPORATE EXISTENCE.—Where a contract has been executed and fully performed on the part of a corporation or of the person with whom it contracted, neither will be permitted to insist that the contract was not within the power of the corporation: *Wright v. Hughes*, 119 Ind. 324; 12 Am. St. Rep. 412, and note; *Alexander v. Searcy*, 81 Ga. 536; 12 Am. St. Rep. 337; *Long v. Georgia Pac. Ry. Co.*, 91 Ala. 519; 24 Am. St. Rep. 931, and note; *Holmes etc. Mfg. Co. v. Holmes etc. Metal Co.*, 127 N. Y. 252; 24 Am. St. Rep. 448, and note. See the note to *Fidelity Ins. etc. Co. v. Western Penn. etc. R. R. Co.*, 21 Am. St. Rep. 913.

FOREIGN CORPORATIONS.—RIGHT TO EXERCISE POWERS IN OTHER STATES: See the note to *Deringer v. Deringer*, 1 Am. St. Rep. 160, 161. Every power which a corporation exercises in a state other than the one where created, depends for its validity upon the laws of that state: *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68; 96 Am. Dec. 831, and extended note.

STATUTES.—EXTRATERRITORIAL EFFECT OF: See *Alabama etc. R. R. Co. v. Carroll*, 97 Ala. 126; *ante*, p. 163, and note.

USURY—BY WHAT LAW GOVERNED.—The law of the place where a contract or a note by its terms is to be performed or paid determines its validity: *Bigelow v. Burnham*, 83 Iowa, 120; 32 Am. St. Rep. 294, and note with the cases collected.

RAISLER v. OLIVER.

[97 ALABAMA, 710.]

POSTMASTERS AND DEPUTY POSTMASTERS ARE LIABLE for losses and injuries caused by their own defaults and negligence.

POSTMASTERS—LIABILITY OF FOR NEGLIGENCE OF ASSISTANTS.—A postmaster is not responsible for the defaults or misfeasances of his clerks or assistants appointed by him under express authority and under his control, unless it appears that he was negligent in not exercising proper care and prudence in the selection of competent and suitable persons to perform such duties, or unless he was himself negligent in failing to properly superintend such assistants in the performance of the particular acts or duties, the doing of which, or the omission to do which, caused the loss or injury.

POSTMASTERS—LIABILITY OF FOR NEGLIGENCE OF ASSISTANTS.—A postmaster who employs a clerk or assistant independent of express authority, and who pays him out of his own salary or means, is liable for his default or misfeasance, as any private person would be for the act of his agent or employee. In the absence of any thing in the record it will be presumed that such assistant is employed merely as an individual, to assist the postmaster in the discharge of his official duties.

JURISDICTION—STATE AND FEDERAL COURTS.—When a legal right arises, and the state court is competent to administer justice, the right may be asserted in that court, although the federal court may have jurisdiction of the same question, subject, however, to the proviso that there is no law limiting jurisdiction to the federal courts.

POSTMASTERS—LIABILITY OF FOR NEGLIGENCE—BURDEN OF PROOF.—The responsibility of a postmaster for money or letters received by him in his official capacity is not that of a common carrier, and proof that letters containing money were delivered to a postmaster for registration, or to his assistant in his presence and by his direction, and the loss of the letters and money, without more, is not sufficient to authorize recovery. The burden of proof is on plaintiff to show culpable negligence affirmatively, and such a state of facts as to authorize the jury to attribute the loss to such negligence.

ACTION to recover one hundred and fifty-nine dollars and twenty cents. Among other things the evidence showed that the plaintiff registered two letters containing said amount of

money; that defendant was busy at the time that the letters were presented for registration, and instructed his clerk, whose name was Cain, to register said letters. The other facts are stated in the opinion. Judgment for plaintiffs, and defendant appealed.

W. T. Sanders and D. D. Shelby, for the appellant.

R. A. McClellan, for the appellee.

⁷¹³ COLEMAN, J. The plaintiffs, Oliver & Co., sued Raiser to recover damages sustained in consequence of the loss of two registered letters delivered at the postoffice to defendant, who was postmaster at Athens, Alabama, to be forwarded by mail to certain parties at Nashville, Tennessee. It is averred that the loss was the result of the culpable negligence of the defendant.

The law is well established that the postmaster general is not responsible for the negligence of postmasters or their deputies, or such assistants. Public policy requires the recognition and application of this rule. We think, upon sound principles of law, and supported by many authorities, that deputy postmasters are held liable for losses and injuries caused by their own defaults and negligence: Story on Bailments, sec. 463; *Lane v. Cotton*, 1 Ld. Raym. 646; Story on Agency, sec. 319 b; 2 Wait's Actions and Defenses, 15; 2 Kent's Commentaries, sec. 610; *Central R. R. etc. Co. v. Lampley*, 76 Ala. 364; 52 Am. Rep. 334; *Whitfield v. De Spencer*, 2 Cowp. 754; *Teal v. Felton*, 12 How. 285; *Schroyer v. Lynch*, 8 Watts, 454; *Claflin v. Hauseman*, 93 U. S. 130.

It would seem from these authorities and others which might be cited that a postmaster is not responsible for the defaults or misfeasances of his clerks or assistants, although appointed by him, and under his control, unless it be shown that the postmaster was negligent in not exercising proper care and prudence in the selection of suitable and competent persons to perform the duties of clerks or deputy assistants, or unless it be shown that the postmaster himself was negligent in the duty resting upon him to properly superintend such clerks or assistants in the performance of the particular acts or duty, the doing of which, or the omission to do which, caused the loss and injury: 2 Kent's Commentaries, sec. 611; Story on Bailments, sec. 463; *Keenan v. Southworth*, 110 Mass. ⁷¹⁴ 474; 14 Am. Rep. 613; Story on Agency, sec. 319 a; *Dunlop v. Munroe*, 7 Cranch, 242.

The exemption from liability of the postmaster for the defaults and misfeasance of his clerks and sub-assistants is available to the postmaster only in cases where such clerks or sub-assistants are appointed in pursuance of some law expressly authorizing it, so that by virtue of the law and the appointment, the appointees become in some sort public officers themselves.

The rules and regulations of the postoffice department provide for employment of clerks and assistants when necessary for a proper and speedy discharge of the business of the office, and when made in pursuance of such rules and regulations, it may be the postmaster himself is not responsible for the defaults of his clerks and assistants, unless under proper averments, it be shown there was negligence in their selection or superintendence, as we have stated above. Under the view we take of the evidence, these principles do not necessarily control the present case.

A postmaster who employs a clerk or assistant independent of express authority, and who is paid by him out of his own salary or means, is liable for the default or misfeasance of his clerk or assistant as any private person would be for the acts of his agent or employee. The doctrine of *respondeat superior* applies in such cases. There is nothing in the record to show that the employment of Cain was not of this latter character, and if we deemed it necessary in order to sustain the rulings of the trial court we would presume that his employment by Raisler, the postmaster, was merely to assist him as an individual in the discharge of his official duties: *Central R. R. etc. Co. v. Lampley*, 76 Ala. 365, 366; 52 Am. Rep. 334.

It may be stated as a general rule that whenever a legal right arises, and the state court is competent to administer justice, the right may be asserted in the state court, although the federal court may have jurisdiction of the same question, subject, however, to the proviso that there is no law limiting jurisdiction to the federal courts: *Clafin v. Hauseman*, 93 U. S. 130, 136; *Teal v. Felton*, 12 How. 284.

The action of the trial court in overruling the demurrer to the first count of the complaint and its several rulings upon questions of evidence, to which objections were reserved, are in accord with these principles, and are free from error.

The responsibility of a postmaster for money or letters received by him in his official character is not that of a common ⁷¹⁵ carrier. Proof that the letters containing money

were delivered to the defendant for registration, or to Cain in his presence and by his direction, and the loss of the letters and money, without more, was not sufficient to authorize a recovery. The burden was on the plaintiff affirmatively to show culpable negligence and such a state of facts as to authorize the jury to attribute the loss to such negligence. If there was evidence tending to show that the defendant was thus negligent in more ways than one, it was not incumbent upon the plaintiff to satisfy the jury of the one particular act of negligence which led to the loss, or to show who got the money. It was sufficient that the jury was reasonably satisfied that the defendant did not exercise that care and prudence in the discharge of his duties in regard to the letters as a reasonable and prudent man would in regard to his own business, and that such negligence was the cause of the loss or injury. As there was no exceptions taken to any of the instructions given by the court to the jury, we presume the court properly instructed the jury as to the burden of proof, and as to what was necessary to constitute culpable negligence on the part of the defendant. Under the foregoing rule, charge number one requested by defendant was properly refused. Charge number two invaded the province of the jury, and was properly refused. It was also objectionable as being argumentative. We find no error in the record.

Affirmed.

JURISDICTION—REMEDY—STATE OR FEDERAL COURT.—The state courts may exercise jurisdiction in all cases in which such jurisdiction has not been exclusively vested in the federal courts: *King of Prussia v. Kuepper*, 22 Mo. 550; 66 Am. Dec. 639; *Copp v. Louisville etc. R. R. Co.*, 43 La. Ann. 511; 26 Am. St. Rep. 198, and note with the cases collected. See, also, the notes to *Gay v. Brierfield Coal etc. Co.*, 33 Am. St. Rep. 138, and *Plume etc. Mfg. Co. v. Caldwell*, 29 Am. St. Rep. 311.

POSTOFFICES—LIABILITY OF POSTMASTERS FOR ACTS OF ASSISTANTS.—A postmaster is liable for his servant's negligence, carelessness, and default, and an action will lie for a larceny of a letter containing money which was stolen from his office: *Coleman v. Frazier*, 4 Rich. 146; 53 Am. Dec. 727, and note; *contra: Keenan v. Southworth*, 110 Mass. 474; 14 Am. Rep. 613. See the full discussion of this subject contained in the monographic note to *Conwell v. Voorhees*, 42 Am. Dec. 208.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

RAILWAY COMPANY v. FERGUSON.

[57 ARKANSAS, 16.]

TRESPASSERS, LANDOWNER'S LIABILITY TO.—THE OWNER OF PRIVATE GROUNDS is under no obligation to keep them in a safe condition for the benefit of trespassers or those who may go upon them uninvited from curiosity or motives of private convenience in no way connected with the owner.

A RAILWAY CORPORATION AS TO STOCK STRAYING UPON ITS RIGHT OF WAY is not under any obligation different from that of other owners or occupiers of real estate.

TRESPASSING STOCK, LIABILITY FOR INJURIES TO.—A LANDOWNER is not liable for injuries received by stock trespassing on his premises on account of such premises being in a dangerous condition and not being kept in proper and safe repair.

A RAILROAD CORPORATION PLACING A BARBED WIRE FENCE ALONG ITS RIGHT OF WAY, and suffering it to become out of repair so that loose livestock may pass through such fence and enter upon such right of way, is not liable for injuries to such trespassing animals from their being frightened by passing trains and caused to run on and become wounded by such fence.

C. B. Moore and Dodge and Johnson, for the appellant.

James H. McCollum, for the appellee.

18 BATTLE, J. Appellant inclosed a part of its railway track and right of way with a wire fence. For three years the fence was permitted to stand without repairs. The result was, at the end of that time, it was in a very bad condition; there were several gaps in it; and it was not connected with the track at the ends. While it was in this condition the colt of appellee strayed on the right of way of appellant and upon the part of its railway track so inclosed; and an engi-

neer of an approaching train, discovering it upon the track sounded the alarm, frightened the colt, and it ran from the track against the wire fence, by which its throat was cut; and the colt died from the wound.

Was the appellant liable to the appellee for the loss occasioned by the failure to construct the fence so as to make it harmless to stock and keep the same in good repair?

A well-established rule of law is, that the owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers or those who may go upon them uninvited, from motives of private convenience in no way connected with the owner, or from curiosity. He is under no obligation to fence or guard any wells, ditches, stone quarries, or other pitfalls or dangerous places on his uninclosed grounds, in order to protect animals straying thereon against injuries; and is not liable for the damages suffered because ¹⁹ he failed to do so: *Hughes v. Hannibal etc. R. R. Co.*, 66 Mo. 325; *Clary v. Burlington etc. R. R. Co.*, 14 Neb. 232; *Leseman v. South Carolina R. R. Co.*, 4 Rich. 413; *Gilman v. Sioux City etc. Ry. Co.*, 62 Iowa, 299; 1 Thompson on Negligence, 298, 303; 3 Lawson's Rights, Remedies, and Practice, secs. 1149, 1151, and cases cited.

In *St. Louis etc. Ry. Co. v. Fairbairn*, 48 Ark. 493, Chief Justice Cockrill, speaking for the court, said: "The appellee was injured by stepping into a cavity caused by a rotten plank in the appellant's platform at Bierne station. The jury found the issues in his favor, and the question whether the appellee was lawfully on the platform at the time he was injured is the only one properly left for our consideration. If he was there merely from curiosity, or for his own convenience for the transaction of business in no way connected with the railway company, no relation existed between him and the company which imposed upon the latter the duty of exercising even ordinary care in maintaining a safe platform for his own use, and it is not liable for his injury."

Is an owner of private grounds under greater obligations to owners of livestock as to such stock? In *K. C., S. & M. Ry. Co. v. Kirksey*, 48 Ark. 368, the court said: "The railroad's obligation as a carrier, or its duty to a person rightfully upon its track, are not coincident with the negative duty not to injure, unnecessarily, stock that wanders upon its right of way and track. It is held to a rigid observance of its public duties, but as to stock straying upon its right of way, its obli-

gation is not different from that of other owners or occupants of real estate. . . . The statute has placed no obligation upon the railroad in that respect, and the rights and liabilities of the company and stockowner are governed by the common law. The company is not required to fence out the stock, and the stockowner enjoys the passive license of free pasturage upon ²⁰ its open premises as upon those of natural persons, without being held to accountability as a trespasser. . . . The technical wrong that the landowner suffers by the entry of another's stock is regarded as too slight to engage the attention of the law, is *damnum absque injuria*. But the privilege of entry and free pasturage is not a right which can be demanded and enforced—it is only an immunity from suit or punishment, and the company or other landowner is under no obligation to expend money or labor in preparing the land for a convenient or a safe enjoyment of it.” And this court, in that case, held that “the duty of railroad companies to avoid unnecessary injury to stock upon their tracks does not require them to keep their entire right of way clear of obstructions which conceal stock from view of the engineer of the train until they rush upon the track unseen, and too late to avoid the injury.”

The law upon this subject, and the reason for it, are clearly and succinctly stated by Chief Justice Gibson in *Knight v. Abert*, 6 Pa. St. 472, 47 Am. Dec. 478, he said: “In this, and perhaps every American, state an owner of cattle is not liable to an action for their browsing on their neighbor's uninclosed woodland. But it follows not that because such browsing is excusable as a trespass, it is a matter of right. It is an immunity, not a privilege; or, at most, a license revokable at the will of the tenant, who may turn his neighbor's cattle away from his grounds at pleasure. Their entry is, in strictness, a trespass, which, for its insignificance, is not noticed by the law, probably on the foot of the maxim, *de minimis*, or perhaps because it is better that all waste lands should be treated as common without stint. It certainly saves vexatious litigation. The particular loss from it is unappreciable, even as a subject of nominal damages, and would probably be held so, even in England, where waste land is altogether worthless. But even if an ²¹ owner of cattle had the right claimed for him, the tenant would not be bound to expend his money or his labor in preparing his land for the safe and convenient enjoyment of it. A man must use his property so as not to

incommode his neighbor; but the maxim extends only to neighbors who do not interfere with it or enter upon it. He who suffers his cattle to go at large takes upon himself the risks incident to it. If it were not so, a proprietor could not sink a well or a sawpit, dig a ditch or a millrace, or open a stone quarry or a mine-hole on his own land, except at the risk of being made liable for consequential damage from it—which would be a most unreasonable restriction of his enjoyment. He might as well be required to level a precipice, put a fence around a swamp, or cut down reclining trees. It is enough, in all reason, that his neighbor's cattle have the range of his forest, without imposing upon him the duty of looking to their safety. If the owner of them do not choose to enjoy his license on that footing, let him keep them at home, or send a herdsman along with them. The law imposes no such duty on the tenant."

Upon the principle stated in the cases we have cited, railroad companies are not required to cover culverts and bridges in their tracks so as to permit stock to pass over them in safety; yet it is a notorious fact, as attested by the records of this court, that cattle frightened by approaching trains have run into uncovered culverts and been killed, and it never has been suggested by any court, so far as known to us, that a railroad company was liable for such injuries because the culverts were uncovered: *Hot Springs R. R. Co. v. Newman*, 36 Ark. 607; *Little Rock etc. S. Ry. Co. v. Trotter*, 37 Ark. 593.

There is, however, a class of authorities which holds, by way of exception to the general rule, that it is the duty of the owners of private grounds to erect suitable guards around the excavations made by them thereon so ²² near a public road that persons and animals passing on the road might accidentally fall into the same, and that he is liable to any one who may be injured by accidents resulting from their failure to do so: *Clary v. Burlington etc. R. R. Co.*, 14 Neb. 232, and cases cited; 3 Lawson's Rights, Remedies, and Practice, sec. 1157, and cases cited; 1 Thompson on Negligence, p. 307. In *Townsend v. Wathen*, 9 East, 277, A kept on his open grounds near the highway, without notice, certain traps baited with flesh for the purpose of catching his neighbor's dogs, and B's dog, led by his natural instinct, ran into one of these traps and was killed, and it was held that A was liable to B for damages caused by the killing of the dog. And in a case in which the defendant had dug a pit

under a cotton gin, near a highway, and kept it uninclosed, with corn and cotton seed scattered about it, and the plaintiff's cow, which he had turned out at a place remote from the gin, fell into it and was killed, this court held that the defendant was guilty of negligence and liable to the plaintiff for the value of the cow: *Jones v. Nichols*, 46 Ark. 207, 55 Am. Rep. 575.

In this case the appellant was under no obligation to construct and maintain a fence along its track or highway, or to place guards around wells, or other pitfalls or dangerous agencies on its right of way, to protect animals, uninvited, wandering thereon against injuries. It was under no greater obligations to provide safeguards against wire fences than it was to place them around pits or other dangerous places. The peculiarity of the danger does not alter the duty or liability. The owner of animals in permitting them to run at large assumes all the risks to which the animals are exposed by reason of such dangers.

In the trial of this case no evidence was adduced tending to show that the appellant placed any thing on its right of way calculated to invite or induce horses and ²³ cattle to go thereon, between its track and the wire fence, and that appellee's colt was thereby invited or induced by appellant to go upon the same at the time it was killed, as in the case of *Sisk v. Crump*, 112 Ind. 504, 2 Am. St. Rep. 213, cited by appellee. There was no evidence tending to show that the wire fence was constructed or maintained in such manner and so near a public street or road as to make it dangerous for horses or cattle passing along the street or road. There was no evidence to show that this case comes within any exception to the general rule. The evidence tended to prove, in short, the following facts: That the wire fence was in bad condition by reason of the gaps in it; that appellee's colt, uninvited, wandered upon the right of way and track of appellant, was frightened by an alarm lawfully given on a passing train, and ran against the fence, and was thereby wounded and killed. The case comes clearly within the general rule, as we have stated it.

But appellant did owe to appellee the duty, when it discovered his colt upon its track, to use ordinary or reasonable care to avoid injury to it by running its train against it, or by frightening and driving it by unnecessary alarms against

the wire fence: *Railway Co. v. Roberts*, 56 Ark. 887; *Atlanta etc. R. R. Co. v. Hudson*, 62 Ga. 679.

Reversed, and remanded for a new trial.

MANSFIELD, J., dissented.

REAL PROPERTY—LIABILITY OF OWNERS TO TRESPASSERS.—Trespassers going upon the premises of another take them as they find them, and run such risks as are incidental to the existing condition of the premises, and cannot complain of their needing repairs, nor recover for injuries received from the condition in which they find such premises: *Woolwine v. Chesapeake etc. Ry. Co.*, 36 W. Va. 329; 32 Am. St. Rep. 859, and note; *Frost v. Eastern R. R.*, 64 N. H. 220; 10 Am. St. Rep. 396, and note; *Galveston Oil Co. v. Morton*, 70 Tex. 400; 8 Am. St. Rep. 611, and note; *Gillis v. Pennsylvania R. R. Co.*, 59 Pa. St. 129; 98 Am. Dec. 317, and note; *Sweeney v. Old Colony etc. R. R. Co.*, 10 Allen, 368; 87 Am. Dec. 644, and extended note; *Sullivan v. Boston etc. R. R. Co.*, 156 Mass. 378; *O'Connor v. Illinois Cent. R. R. Co.*, 44 La. Ann. 339. See note to *Bedell v. Berkeley*, 15 Am. St. Rep. 374, and the extended note to *Coxley v. Pittsburg etc. Ry. Co.*, 40 Am. Rep. 667.

RAILROADS—DEFECTIVE FENCES—LIABILITY FOR INJURY TO STOCK STRAYING ON TRACK.—Where a railroad company is not bound to fence its track, it is not liable to the owner of cattle, who suffers them to go upon the track where they are killed, unless the damage done is gratuitous: *Railroad Co. v. Skinner*, 19 Pa. St. 298; 57 Am. Dec. 654, and note; *Layne v. Ohio etc. Ry. Co.*, 35 W. Va. 438; *Indianapolis etc. R. R. Co. v. McClure*, 26 Ind. 370; 89 Am. Dec. 467, and note. See, also, on this point *Oregon Ry. etc. Co. v. Smalley*, 1 Wash. 206; 22 Am. St. Rep. 143, and note. A railroad company is not liable for injuries to cattle unlawfully upon uninclosed lands adjoining its track: *Perkins v. Eastern R. R. Co.*, 29 Me. 307; 50 Am. Dec. 589, and note. A railroad company is not liable for injury to stock trespassing on its track in the absence of negligence on the part of its servants, even when the law requires the company to fence its road and it has failed to do so: *Jackson v. Rutland etc. R. R. Co.*, 25 Vt. 150; 60 Am. Dec. 246, and note; *Chapin v. Sullivan R. R.*, 39 N. H. 564; 75 Am. Dec. 237, and note; *Chapin v. Sullivan R. R.*, 39 N. H. 53; 75 Am. Dec. 207, and note. This question will be found further treated in the following cases: *Memphis etc. R. R. Co. v. Kerr*, 52 Ark. 162; 20 Am. St. Rep. 159, and extended note; *New Orleans etc. R. R. Co. v. Bourgeois*, 66 Miss. 3; 14 Am. St. Rep. 534; *Missouri Pac. Ry. Co. v. Gedney*, 44 Kan. 329; 21 Am. St. Rep. 286, and note; and the extended notes to the following cases: *Humes v. Salem etc. R. R. Co.*, 96 Am. Dec. 681; *Savannah etc. Ry. Co. v. Geiger*, 58 Am. Rep. 703, and *Tenawanda R. R. Co. v. Munger*, 49 Am. Dec. 261.

GUNN v. WHITE SEWING MACHINE COMPANY.

[57 ARKANSAS, 24.]

INTERSTATE COMMERCE—FOREIGN CORPORATIONS.—The power of Congress to regulate commerce includes commerce carried on by corporations as well as commerce carried on by natural persons, and a state can no more regulate commerce carried on by the former than such commerce carried on by the latter.

INTERSTATE COMMERCE.—IF A CORPORATION FORMED UNDER THE LAWS OF ONE STATE enters into a contract with residents of another state to act as its agents in the sale of its property in the latter state, and such agents give a bond with sureties to account for and pay over the proceeds of such sale, and thereafter goods are shipped by the corporation to such agents upon orders received in the state of its domicile, a statute of the state to which the goods are shipped declaring that all contracts of foreign corporations doing business therein shall be void unless such corporation shall have filed a certificate in the office of the secretary of the state designating an agent upon whom process may be served, is inoperative against such bond, because to give it operation would be to permit the state to regulate interstate commerce.

J. H. Harrod and E. A. Bolton, for the appellant.

Sanders and Watkins, for the appellee.

²¹ **BATTLE, J.** The White Sewing Machine Company was a corporation organized and doing business under the laws of the state of Ohio, and was engaged in the selling of sewing-machines and other goods at Cleveland, in that state. A. I. Julian and N. H. Gunn were citizens of Faulkner county, in this state. On or about the sixth day of August, 1888, the sewing-machine company entered into a contract with Julian, by which the company undertook and bound itself to sell sewing-machines and the component parts thereof to Julian at stipulated prices, on a credit, and Julian agreed to canvass Faulkner county or cause it to be canvassed "with horse and wagon, exclusively, for the sale of the White sewing-machines." Julian was to order the machines, or the component parts of the same, when he desired them to be sent to him. At the same time Julian, as principal, and Gunn, as surety, executed a bond to the sewing-machine company, conditioned, among other things, that Julian would pay all sums of money that he would be owing to the company for sewing-machines or otherwise. After this the company, pursuant to the terms of its contract and on the faith of the bond executed to it, sold and shipped to Julian a large number of sewing-machines and other property, and Julian became indebted to it on account thereof in a large sum of

money. Julian failing to pay, the company brought this action on the bond against Gunn to recover the same, or a part thereof.

The only defense made by Gunn was, the company had not, at the time the bond was executed, filed any certificate in the office of the secretary of the state of Arkansas, designating an agent upon whom process could be served, and its principal place of business in this state.

Evidence was, however, adduced at the trial tending to prove, among other things, the facts before stated, and that the machines and other property were sold by the company in Ohio and shipped to Julian in this state. The court below held that these transactions were a part of the interstate commerce of the United States, and were not affected by the laws of this state, and rendered judgment in favor of plaintiff against the defendant, and he appealed.

Appellant contends that the bond sued on is void under the act of the general assembly of April 4, 1887. That act declares that, before any foreign corporation shall begin to carry on business in this state, it shall, by a certificate under the hand of the president and seal of such company, filed in the office of the secretary of state, designate an agent, who shall be a citizen of the state, upon whom process may be served, and also state therein its principal place of business in this state; and provided that if any such corporation shall fail to file such certificate, all its contracts with citizens of this state shall be void as to the corporation, and shall not be enforced in any of the courts of this state in favor of the corporation.

It is conceded that the certificate required by that act was not filed by the appellee until after the debt sued on matured. Was the bond void?

In *Paul v. Virginia*, 8 Wall. 168, the court, speaking of a foreign corporation, said: "The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states

may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

But this right of the state cannot be so exercised as to interfere with the power of Congress to regulate interstate commerce. In *Paul v. Virginia*, 8 Wall. 168, the corporation involved in litigation was an insurance company, and was not engaged in interstate commerce. In speaking of the power to regulate commerce, in that case, the court further said: "It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. . . . This state of facts forbids the supposition that it was intended in grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations."

²⁴ In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, the court, speaking of interstate commerce, said: "The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the states may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character, and require uniformity of regulation affecting alike all the states, the power of Congress is exclusive. . . . Nor does it make any difference whether such commerce is carried on by individuals or by corporations."

In *Pembina etc. Mining Co. v. Pennsylvania*, 125 U. S. 181, the court, after discussing this power at length, said: "The

only limitation upon this power of the state to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate, or foreign. The control of such commerce, being in the federal government, is not to be restricted by state authority": *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727.

²⁵ In *Robbins v. Shelby Co. Taxing Dist.*, 120 U. S. 489, the court said: "Certain principles have been already established by the decisions of this court which will conduct us to a satisfactory decision. Among those principles are the following: 1. The constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation; . . . 2. Another established doctrine of this court is, that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom."

"Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe": *County of Mobile v. Kimball*, 102 U. S. 691; *Escanaba Co. v. Chicago*, 107 U. S. 678.

"Of the class of subjects local in their nature, or intended as mere aids to commerce," on which it has been held that the authority of the states may be exerted for their regulation and management until Congress interferes and supersedes it, "may be mentioned harbor pilotage, buoys, beacons to guide mariners to the proper channels in which to direct their vessels," bridges over navigable streams, wharfs, wharfage, and quarantine. "State action upon such subjects," said the court, in *County of Mobile v. Kimball*, 102 U. S. ²⁶ 691, "can constitute no interference with the commercial power of Con-

gress, for when that acts the state authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done in respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by state authority."

A few cases will serve to show the character of some of the statutes which have been held by the courts to be unconstitutional because they interfered with the exclusive power of Congress to regulate interstate commerce, and thereby what constitutes, in part, the commerce over which such power extends. In *Hall v. De Cuir*, 95 U. S. 485, a statute of the state of Louisiana, which attempted to regulate the carriage of passengers upon railroads, steamboats, and other public conveyances, and which provided that no regulation of any companies engaged in that business should make any discrimination on account of race or color, was considered. The case presented under the statute was that of a person of color who took passage from New Orleans for Hermitage, both places being within the limits of the state of Louisiana, and was refused accommodations in the general cabin on account of color. In regard to this the court declared that, "for the purposes of this case, we must treat the act of Louisiana of February 23, 1869, as requiring those engaged in interstate commerce to give all persons traveling in that state upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. . . . We have nothing whatever to do with it as a regulation of internal commerce, or as affecting any thing else than commerce among ³⁷ the states." And, speaking in reference to the right of the states, in certain classes of interstate commerce, to pass laws regulating them, the court said: "The line which separates the powers of the states from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. . . . But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that posi-

tion. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without, or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage."

In *Robbins v. Shelby Co. Taxing Dist.*, 120 U. S. 489, the taxing district of Shelby county, Tennessee, which included the city of Memphis, acting under the authority of a statute of that state, attempted to impose a license tax upon a drummer for soliciting, within that district, the sale of goods for a firm in Cincinnati which he represented; but the court decided that such a soliciting of business constituted a part of interstate commerce, and that the statute of Tennessee imposing a tax upon such business was in conflict with the commerce clause of the constitution of the United States, and was therefore void.

In *McCall v. California*, 136 U. S. 104, the plaintiff in error was convicted of violating an order of the city and county of San Francisco, in the state of California, which made it a misdemeanor for any one to act as an ²⁸ agent of a railroad company without having first paid the sum of twenty-five dollars as a license fee. He was an agent in said city and county for the New York, Lake Erie, and Western Railroad Company, a corporation having its principal place of business in the city of Chicago, and which operated a continuous line of road between Chicago and New York. As such agent his duties consisted in soliciting passenger traffic in that city and county over the road he represented. He did not sell tickets for his company; neither did he receive nor pay out money on account of it. His sole offense consisted in soliciting passengers to go over his company's road, without having paid the license tax imposed upon him by said order as a condition precedent to his right to act as such agent in said county. The court held that the license fee as to such agency was a tax upon interstate commerce, and in that respect was unconstitutional. The court, speaking of the agency and tax, said: "The object and effect of his soliciting agency were to swell the volume of the business of the road. It was one of the 'means' by which the company sought to increase and doubtless did increase its interstate passenger traffic. It was not incidentally or remotely connected with the business of

the road, but was a direct method of increasing that business. The tax upon it, therefore, was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

In this case the contract between the corporation and Julian and the bond sued on were executed in this state and were business transacted in Arkansas. But no sales or indebtedness were created by them. The contract was only an agreement to sell, and the bond was a condition upon which the corporation agreed to sell and a means adopted to secure the indebtedness to ^{be} contracted by sales, and both constituted a contract. They were made a foundation of a future trade between a corporation of one state and a citizen of another and were a direct method devised to increase the business of the former, and as to them served as a basis of interstate commerce. Relying on them the corporation sold the machines and other property and shipped them from the state of Ohio, its place of manufacture and business, to Julian in Arkansas, the place of sales being in Ohio. Until they ceased, according to their terms or by agreement of the parties, to be of any force, they were an inducement to, and entered into, every sale and formed a part of it. According to the principles firmly established by numerous decisions of the supreme court of the United States, they (the bond and contract) the sales and shipment of the machinery and other property were a part of the interstate commerce of the United States, which Congress has the exclusive right to regulate, and were not and could not be affected by the act of April 4, 1887.

Judgment affirmed.

COCKRILL, chief justice dissented. He maintained that a corporation created under the laws of one state had no right to recognition in another, and might be absolutely excluded from its jurisdiction and subjected to such conditions, upon the privilege of doing business, as the state might think expedient, and that such of the expressions to be found in the decisions as purport to establish exceptions in favor of corporations engaged in interstate commerce were mere *dicta*; that the only question before the court was whether the White Sewing Machine Company did business within the state of Arkansas as a corporation; that the business which the company did in the state was not confined to a single act or transaction; that the facts were that the company maintained a resident agent in the state, whose duties, however, were restricted to selling to different individuals the right to sell machines for the company within designated territorial limits, and after these individuals bound themselves to sell upon terms fixed by their con-

tracts; and the individuals gave bonds with sureties to account to the company for all sums due upon sales made; that the contracts thus made with the agents were executed and to be performed in the state of Arkansas, and if they had any connection with interstate commerce, it is remote; that the contracts of the agents of the corporation and the contracts of suretyship were domestic contracts, and therefore not made with a foreign corporation, and were subject to the statutes of the state prescribing the conditions upon which such a corporation might do business therein. Furthermore, the judge was of the opinion that though the business of the corporation was conceded to be interstate, the statute could not properly be regarded as a regulation in limitation thereof; that the statute was not directed against commerce or any of its regulations, but related only to the right of citizens to sue in the jurisdiction where the causes of action arise, and imposes upon a corporation only the duty of submitting to that jurisdiction. Judge MANSFIELD concurred in the dissenting opinion.

INTERSTATE COMMERCE—VALIDITY OF LICENSE TAXES IMPOSED ON CORPORATIONS FORMED IN OTHER STATES.—This subject will be found treated in the extended notes to *People v. Wemple*, 27 Am. St. Rep. 564, and *State v. Goodwill*, 25 Am. St. Rep. 873.

RAILWAY COMPANY v. CRAVENS.

[57 ARKANSAS, 112.]

CARRIERS EXACTING CONTRACTS LIMITING LIABILITY.—If a common carrier furnishes its agent bills of lading, uniform in terms and containing stipulations limiting its liability for loss to losses occasioned by its negligence, and would not have received property for shipment except under such bills and stipulations, a shipper, though he did not expressly object to such bills, is not deemed to have assented thereto. Under the circumstances, because he had no choice except to ship his property under the terms offered by the carrier, the stipulation of exception from liability must be regarded as unfairly obtained and therefore as inoperative.

CARRIERS, CONTRACTS LIMITING LIABILITY OF.—It would violate the policy of the law to permit contracts to be made restricting the carrier's common-law liability where he does not afford shippers an opportunity to contract for the service without restriction.

Dodge and Johnson, for the appellants.

J. E. Cravens and J. M. Moore, for the appellee.

¹¹⁴ **HEMINGWAY, J.** The plaintiff sued to recover the value of cotton that was burned without fault of the defendants, while they held it for shipment.

The defense was that the defendants were exempt from liability by the terms of the bills of lading under which they received the cotton.

It was alleged in the complaint and admitted in the answer that the defendants operated a line of road from Hartman,

where the cotton was received, to the several points of consignment, and that they received the cotton under bills of lading containing provisions to the effect that they should not be liable except for losses occasioned by their negligence; but it was alleged that said provisions were void, for the reason that they were without consideration, unfair, unjust, and unreasonable.

¹¹⁵ To maintain his contention, plaintiff proved that the defendants fixed and published a uniform rate for carrying cotton between said points, and that his shipments were made according to that rate; that the defendants furnished to their agent at Hartman printed forms for bills of lading that were uniform in their terms and contained the provisions relied upon in this case; and that said agent had no authority to receive and would not have received the cotton, except under said bills. It is shown that the plaintiff knew that the bills contained the provisions relied upon, and that he made no objection to the rate fixed or the provisions contained therein. There were other facts proved, but, as we understand the law, they do not affect the case made.

There was no serious controversy as to the amount of plaintiff's loss, and it is not now insisted that the verdict was excessive.

The contention is that the court erred in directing the jury upon the law regulating the provisions of the bills of lading providing for defendants' exemption from their common-law liability; and no objection is made to its directions upon other principles of law. We deem it unnecessary to set out or consider *seriatim* the several instructions, for in stating our views of the law we determine all questions arising upon them that are material in this case. If upon the case stated the provisions are deemed valid in law, the defendant has a perfect defense, and the action should be dismissed; on the contrary, if the provisions are deemed invalid in law, the defendants have no defense, and no error in the court's charge could have prejudiced them—that is, the judgment should be reversed or affirmed according as the contracts are deemed valid or invalid.

It is contended that they were invalid because they were without consideration, but we have not deemed it necessary to enter upon the consideration of this question. ¹¹⁶ The further objection urged to them is that they were unfairly ob-

tained, and are therefore unjust and unreasonable in the eye of the law.

To maintain this position it is argued that the plaintiff had an absolute right to demand that defendants receive and carry his cotton under their accountability at common law, but that he could procure them to do it only by accepting the bills offered; and that for this reason his agreement to the conditions of the bills was not fairly obtained, and they should be adjudged unjust, unreasonable, and void. To this the defendants reply that there is nothing to show that the terms of the bills were unjust or unreasonable, and that, as plaintiff understandingly accepted them, he is conclusively bound by them.

There are principles of law pertinent to the case that are well settled, among which may be stated the following: That a carrier is bound to receive and carry all articles tendered him of the kind that he engages in carrying; that in performing that service the law casts upon him the accountability of an insurer, unless he undertakes the service in the particular case under a special contract with the shipper restricting his liability; that the carrier can by no act of his own modify his liability, but that every modification must arise out of a contract, fairly made, and just and reasonable in its terms.

It follows, from the principles stated, that the law deems it just and reasonable to hold the carrier to the duty of carrying with the accountability of an insurer if the shipper so wish, so that the carrier can neither decline to perform the service, nor, of his own motion, escape that extreme accountability. He is authorized to contract with the shipper for a restricted liability, but such restriction depends upon the consent of the shipper. He has the right of choice between the common-law¹¹⁷ undertaking and any special contract that the carrier may wish to make, and the making of a modified contract must represent his choice. But although his consent is an indispensable element in such a contract, it is not conclusive of its validity; for the law will permit the carrier to be released from his common-law liability, not upon every contract to that effect that would be valid if it related to other matters, but only in pursuance of a contract fairly made, the terms of which are deemed just and reasonable. So that while a carrier claiming an exemption must show a contract providing for it, even this will not avail him if it appear to be unfair, unjust, or unreasonable.

Whether the agreement relied upon in a particular case satisfies the requirement of the law as regards its terms and the manner of its procurement must be determined in view of the rights and duties of the parties, the policy of the law in defining them, and the tendency of the contract to conserve or to violate such policy.

If an intending shipper should be refused transportation because he would not make a special contract, he might desist from shipping and hold the carrier for damages. Of this there can be no doubt, and we do not understand that defendants question it. If it were otherwise, the carrier could refuse to perform a service, the performance of which is its primary duty, and justify upon the ground that its intending customer declined to release it from a liability which the wisdom of the law imposes on it; and while the law will not permit it to restrict its liability, it would thus recognize a restriction due to what, viewed practically, was no less than its compulsion. This in effect would authorize it to abrogate a rule of law designed to hold it to a discharge of its duties, and the law does no such foolish thing as prescribe regulations and vest the party to be regulated with the right to appeal them.

¹¹⁸ Taking it to be settled that a refusal to carry except upon such condition is a wrong, and that one intending to ship, who declines to do it upon such terms, has a right of action for his damage, we are next to consider what his attitude is if instead of declining to ship upon the condition, he elects to ship and accedes to the condition in order to obtain transportation.

The law, as we have seen, deems it the best policy that the carrier should bear the general liability of an insurer, except where his customer consents to bear a part of the risk, in which case it seems to contemplate that the terms upon which such consent is given will guard and preserve the public interest. But the consent meant is certainly not a constrained submission to terms imposed; not a consent extorted by what the law characterizes as duress, nor what is practically, as society is organized, the same thing; but it is what Mr. Pomeroy calls an "absolute consent"—a consent that implies a physical, intellectual, and moral power, freely and deliberately exercised. Consent of a different kind may be, and often is, all that is required to make a contract binding at law and even in equity; but it cannot make a contract fair, just, or reasonable. As a rule, the validity of a contract in no wise

depends upon its fairness, nor the justness or reasonableness of its terms, nor the adequacy of the consideration, provided it rests upon one deemed valuable; nor will it be invalidated by reason of the fact that the party was in pecuniary or other necessity or distress, provided it was intelligently and freely made, without the use of undue pressure. If the party freely and intelligently elect to make a hard, unequal, and unjust contract, the courts will not make a better one for him, or relieve him of the one made, merely because he was in straitened circumstances and it seemed to him necessary to make it in order to secure relief. The courts decline to thus hamper the independence of the ¹¹⁹ individual or limit his right to make his own contracts, such functions pertaining to paternal and not to free government. But relief is withheld upon the ground that the party had his choice between not acquiring the benefits accruing under the contract and acquiring them according to its terms, and had intelligently and freely exercised his choice and elected to take the benefits of the contract. The reason does not apply where the party acquires nothing under the contract, and is constrained to consent to it by reason of the fact that the other party had made this agreement necessary to the enjoyment of an important and apparently indispensable privilege to which he was already entitled. But even when a party, by an unequal or unjust contract made without duress or misrepresentation, acquires something to which he had no other right, courts of equity have shown a disposition to relieve the other party where it appeared he was in pecuniary necessity or distress that impelled him to make an undue sacrifice, and advantage was taken of such condition: 2 Pomeroy's Equity Jurisprudence, sec. 948; *Buford v. Louisville etc. R. R. Co.* 82 Ky. 286; *Brown v. Hall*, 14 R. I. 249; 51 Am. Rep. 375; 1 Wharton on Contracts, sec. 170.

Upon this principle, contracts to pay unconscionable interest where no usury laws are in force, and to transfer expectant estates for considerations grossly inadequate, have been declared void: *Miller v. Cook*, 10 L. R. Eq. Cas. 641, and cases *supra*.

Without committing this court to the doctrine of those cases to the extent of holding that an advantage taken of one's necessities or distress to obtain a hard bargain will afford ground for equitable relief, we think it necessarily and properly deducible from them that it is not fair, just, or reason-

able in the eye of the law to take advantage of one's necessities or distress to obtain a contract by which he releases some valuable right or assumes some onerous liability—at least where it does ¹²⁰ not appear that he received any corresponding benefit; and that while the circumstances might not warrant the avoidance of an ordinary contract, they would defeat such a one as depends for its efficacy upon its fairness, and the justness and reasonableness of its terms.

Applying the principle stated to this class of cases, the question is, whether it can be declared as a matter of law that an intending shipper is under a necessity to agree to a special contract which the carrier proposes as a condition to receiving and carrying his property; and if so, whether it can be further declared that the carrier takes an unfair advantage of his necessity to obtain the contract.

It is a well-known fact that the prosperity of the public collectively, and of its members individually, depends absolutely upon transportation and transportation agencies. And that the carrying business is mostly concentrated in a few powerful corporations, to a large extent controlling monopolies, natural if not legal, whose position enables them to control it. Circumstances, well understood, that exist without any design of the law, give them the power to shape the carrying business and impose upon it such conditions as they see fit. Every demand they make represents the will of their aggregate being, backed up by all their concentrated powers. The public, in meeting such demands, act separately and not collectively. The individual stands alone and can oppose, to the demand coming from such concentration of corporate power, the influence of but one member of the vast aggregate that comprises the public. Whether he gives the carrier his patronage, or does not, matters but little to the latter; but whether the carrier transports his property promptly and safely will perhaps determine whether he succeeds or fails in business. If he declines the terms proposed, and refrains from shipping, he has no adequate redress. If he sues to recover his damage, he is subjected to all the delay and expense incident to ¹²¹ such litigation, and at last recovers only what the law regards as his damage, and must himself stand, what would generally be much greater, the loss which the law deems too remote to estimate as damage. If he withhold his patronage and attempt by this means to induce the carrier to recede from his terms, he can accomplish nothing;

for his business is too small to make his patronage material, and, besides, if his property is to be transported, he must at last deliver it to the exacting carrier; for, from the nature of the business, he can rarely find any other. So that he would only have postponed giving his patronage, and the delay in shipment, that may have been very detrimental to his business, would not be appreciable to the carrier. In considering the relative positions of the parties, Judge Bradley thus states his attitude: "He is one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers rather to accept any bill of lading or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this or abandon his business": *Railroad Co. v. Lockwood*, 17 Wall. 379.

The supreme court of Michigan, with reference to the same subject, thus defines the attitude of railroad companies: "They do, and necessarily must, absorb nearly the entire business of carrying merchandise and property requiring carriage and deposit along and in the vicinity of their route, and competition is virtually destroyed. There is, in a certain sense, a compulsion upon all requiring transportation to employ them; and a restriction of liability by notice is measurably compulsory. There is no mutuality or freedom of choice offered. The person desiring to have goods forwarded is compelled in reality to have them carried forward by the company; their obligation is to carry them; and a restriction of ¹²² the liabilities primarily growing out of that obligation, by a notice, is an imposition of terms rather than a contract": *Michigan Cent. R. R. Co. v. Hale*, 6 Mich. 258. See *Little Rock etc. Ry. Co. v. Eubanks*, 48 Ark. 460; 3 Am. St. Rep. 245.

Why, we would ask, is restriction by express agreement, if necessary to obtain transportation, less compulsory, less an imposition of terms, or more in the nature of a contract? The unequal condition of the parties is the same in either case; the necessity of the one to obtain transportation and the control of it by the other exist in either case; the only difference between the agreement by notice and that by writing in the bill of lading is that in the one case consent is implied and in the other express, but in either case the party is bound to give it in order to enjoy a privilege of great and possibly vital financial importance to him. The agreement

in neither case embodies the free and deliberate consent of both parties, for one did what he felt bound to do, while the overmastering influence of the other enabled him to embody his will in a formal contract.

The relative position of the parties must be well understood by both of them—by the individual desiring to ship property and the carrier to whom it is offered. The individual feels that transportation is necessary to his success, and that unless he gets it promptly he will suffer inconvenience and perhaps loss; he regards the probability of loss in transit as remote, and knows that if there is no loss the contract is immaterial. Under such circumstances he will assume the risk of contingent future loss, rather than sustain a loss that is certain and present, as men usually are prone to sacrifice contingent future interest to satisfy present wants. So we think it should be held, as a matter of law, that the parties stand upon a footing of inequality, and that individuals desiring to make shipments are under a necessity sufficient in the ordinary affairs of life to amount to compulsion, ¹²³ where it is pressed. The question then is, whether, in the case stated, a carrier, in making agreements exempting him from his common-law liability, takes an unfair or unjust advantage of the situation and of his customers' wants.

The answer seems plain, in the light of what has already been said. The service is in fact an absolute necessity to the individual; the carrier is by law bound absolutely to perform it. It affects as well the public interest as that of the individual, and the law regulating it, recognizing the unequal footing of the parties, has regard alike to both interests. Great and valuable powers and privileges are conferred upon the carrier, and in return for them, out of regard for the general good, the law exacts that he shall promptly perform it without damage to property committed to him. He accepts the grant upon those terms, enjoys its benefits and thereby acquires a controlling influence in the body politic, and then declines to perform the service, except upon the condition that he be released from the accountability he assumed. That is, he will perform the service only upon the condition that his customer carry a risk which, except where his customer prefers to carry it, the wisdom of the law has imposed upon him. This is a plain dereliction of a public duty, and it is a wrong to the customer, since it deprives him of the right to have the

service and to choose whether it be performed at one price without risk to him, or at another price partly at his risk.

But it is said that if the party knowingly consent to a special contract, no one else can object, and that he cannot be heard to say that it was unfair or that an advantage was taken of him, since he acted freely and intelligently. This, as we have seen, is a mistake, for such contracts affect the interests of the public and are subject to public regulation; and besides, the circumstances ¹²⁴ do not warrant the assumption of fact that the party consented freely, but rather show that he submitted to terms that he was bound to accept when the other party deprived him of the opportunity to choose between them and the contract which the law entitled him to demand. For he was, as we have seen, as much entitled to be indemnified against loss in transit as to the service demanded.

The law imposes no necessity for an election between the two rights, and the carrier can impose none. But the carrier's refusal to perform the service without a release of his liability takes away the right to choose which the law gives, and forces an election between rights that are not inconsistent. Thus the carrier does a wrong and thereby creates a necessity for the wronged party to give the consent relied upon; and the question is whether one who does a wrong that places another under the necessity of agreeing to his proposals, takes an unfair or unjust advantage in the matter. It is the tyranny of power over dependence, and therefore unfair, the deprivation of a right, and therefore unjust. The reply that the party knowingly consented under circumstances not constituting duress or fraud, and that this is conclusive against him, is not sufficient in law. If it were, a contract knowingly made to release a carrier from liability for his negligence would be sustained, but we know that the law is otherwise. It overlooks two important features of this class of contracts, the first, that the individual is at a disadvantage in dealing with the carrier, and is bound by force of circumstances to accept whatever terms are offered because he has no reasonable or practicable alternative; the second, that such contracts affect the interests of the public, on account of which the law will suffer them to be made only when they are fair, just, and reasonable.

¹²⁵ In this case the plaintiff did not object to the contract proposed or ask for a different one; but if he had, the agent

could not, and would not, have entered into any other. Does this affect the case? We think not, but that the case stands just as if the plaintiff had demanded a different contract and agreed to the one accepted because he could get no other. Carriers do their business in pursuance of a general plan, and of this the public are advised, and when the defendants adopted a plan, and instructed their agent to pursue it, and authorized him to pursue no other, their customers were not called upon to ask a change of the plan, or a departure from its terms, in their particular matters; they had a right to suppose that the agent would not deviate from his instructions, and the evidence shows that in this instance he would not: *Heiserman v. Burlington etc. Ry. Co.*, 63 Iowa, 736. Besides, if defendants prepared to do business upon one plan only, it should have been in accordance with their common-law liability; the public had a right to that service, promptly performed, and should not have been subjected to any delay incident to preparing to do it, or instructing agents with regard to it. If any customer were to be delayed, such as desired service under special contracts, and not those who desired it under the common-law contract, should have been subjected to the inconvenience.

The case may be stated as follows: The defendants were bound to accept and carry the cotton as insurers; they prepared to do it, and authorized their agent to do it for them, only upon condition that they be exempt from such liability; and the plaintiff, being able to make no other contract for the carriage of his cotton, agreed to the one proposed. They contend that though the law prescribes that such contracts shall be fair, just, and reasonable, the party's making it is conclusive as to those matters, in the absence of fraud or duress as defined by ¹²⁶ law. We do not assent to the position, but hold that, to maintain the policy of the law with reference thereto, such contracts must be the free act of the party, and reflect his choice as between the contract to which the law entitles him and the one relied on. One which it was necessary for him to make, by reason of his circumstances and the carrier's refusal to make any other, is not fair to him, and would not be deemed just or reasonable in law—at least without a showing that its terms really conserved his interest.

In other words, we think it would violate the policy of the law to permit contracts to be made restricting the carrier's common-law liability, where the carrier does not afford his

shippers an opportunity to contract for the service without such restriction. It may be that shippers would prefer cheaper service with restricted accountability to more expensive service with unrestricted accountability; but they are entitled to a choice, and the carrier cannot deprive them of it, either directly or by any thing which amounts practically to its deprivation. In support of this conclusion we cite the case of *Louisville etc. R. R. Co. v. Gilbert*, 88 Tenn. 430. But if we were without a precedent, we think the established principles and policy of the law could not be maintained upon a different conclusion. If carriers could maintain exemptions where the opportunity to make a contract without them was not afforded, the result would be that such contracts would be universal; and it would be better to state the law generally, as it would in fact be in every case, that the carrier was only liable for his negligence. But the law has, in its wisdom, established a different rule, which it is the duty of courts to conserve, rather than overturn. It follows, upon the views indicated, that the contracts relied upon are invalid, and the judgment is therefore affirmed.

THE case of *Railroad Co. v. Spann*, 57 Ark. 127, was one in which the plaintiff sued to recover for damages sustained by him as a shipper of livestock, for the failure of the carrier to permit the stock to be unloaded, rested, watered, and fed, whereby part of the stock suffered death, and the balance was depreciated in value. The defendant pleaded that the stock had been shipped under a special contract or bill of lading exempting the company from liability from all loss occasioned by reason of heat, suffocation, or other results, and from all liability from loss by reason of any delay from any cause except negligence on the carrier's part. The trial judge charged the jury that the limitations of liability in the bill of lading were void unless the plaintiff had procured the shipment of his property at reduced rates, as stated in such bill. The jury returned a verdict against the defendant. The judgment was affirmed on appeal, and the following opinion was filed:

"This case presents the question determined in *Railway Co v. Cravens*, 57 Ark. 112, *ante*, 230.

"The plaintiff did not in this case, as in that, introduce proof to show that he had no option in accepting the bill of lading, or that he accepted it because he could not procure a shipment of his horses without doing so; but the facts above appear by the recitals of the bill of lading upon which the defendant relied, and the defense therefore failed. The bill of lading was upon a printed form, and contained fifteen sections limiting the defendant's common-law liability. It provided that the company's rules and regulations, printed at its head, should constitute a part of it; and the first of said rules is as follows: 'No station agent of this railroad has any power or authority to bind this railroad in regard to the shipment of livestock except by written contract in the following form'—following which is the contract with the fifteen limiting clauses. It thus appears that the railroad would not receive

or carry the stock unless the shipper accepted the bill of lading relied upon, as ruled in the *Cravens* case, such a contract is not deemed fair to the shipper or just and reasonable in law, and is invalid.

"As the bill of lading furnished the evidence of its invalidity, the defendant, though an intermediate carrier, could claim no more under it than the carrier that issued it.

"All objections to the instructions relate to this matter; and, as it furnished no ground of defense, it is unnecessary to consider them.

"It is further argued that the verdict is excessive, and we are by no means satisfied that we should have rendered one so large; but if plaintiff's testimony was true, the amount recovered does not exceed his loss, and whether his testimony was true, or was overborne by the weight of conflicting testimony, was a question for the jury, not for us."

CARRIERS—SPECIAL CONTRACTS LIMITING LIABILITY.—A common carrier cannot, by any act of his own to which the shipper does not consent, limit his liability, but the parties may make an express contract for that purpose: *Wallace v. Mathews*, 39 Ga. 617; 99 Am. Dec. 473, and note. A carrier's common-law liability cannot be limited by general notices, when brought to the knowledge of the shipper, unless there is very clear proof that the latter expressly assented to them: *Farmers' etc. Bank v. Champlain Transp. Co.*, 23 Vt. 186; 56 Am. Dec. 68, and note; *Western Transp. Co. v. Newhall*, 24 Ill. 466; 76 Am. Dec. 760, and note; *Buckland v. Adams Exp. Co.*, 97 Mass. 124; 93 Am. Dec. 68, and note. A shipper is bound by a contract limiting a carrier's liability, though he did not read it or hear it read, provided the carrier resorted to no unfair means, and practiced no fraud or imposition in securing his signature: *St. Louis etc. Ry. Co.*, 50 Ark. 397; 7 Am. St. Rep. 104, and note. See the extended notes to *Bissell v. New York etc. R. R. Co.*, 82 Am. Dec. 380; *Kansas City etc. R. R. Co. v. Rodebaugh*, 5 Am. St. Rep. 719-728.

CARRIERS—DUTY TO CARRY GOODS OFFERED FOR TRANSPORTATION.—Common carriers are bound to carry articles within the scope of their business, without any other contract than such as the law would imply: *Adams Exp. Co. v. Nock*, 2 Duvall, 562; 87 Am. Dec. 510, and note. A railroad company is liable as a forwarding agent for refusing to receive goods without a good excuse: *Maybin v. South Carolina R. R. Co.*, 8 Rich. 240; 64 Am. Dec. 753; *Western Transp. Co. v. Newhall*, 24 Ill. 466; 76 Am. Dec. 760, and note with the cases collected. See, also, the extended note to *Kansas etc. Ry. Co. v. Nichols*, 12 Am. Rep. 500.

PIPKIN v. WILLIAMS.

[57 ARKANSAS, 242.]

FRAUDULENT TRANSFERS.—A TRANSFER OF A HOMESTEAD CANNOT BE FRAUDULENT AS AGAINST CREDITORS OF THE GRANTOR, because they have no right to resort to it for the payment of their demands.

HOMESTEAD.—A CONVEYANCE OF A HOMESTEAD IN WHICH THE HUSBAND ALONE APPEARS AS GRANTOR, but containing a clause declaring that the wife releases to the grantee all her right or possibility of dower, the deed being signed and acknowledged by both spouses, cannot be regarded as executed by the wife for any purpose except to release her dower, and is therefore inoperative as against the homestead rights either of herself or of her husband.

HOMESTEAD.—A CONVEYANCE OF A HOMESTEAD IN WHICH THE WIFE DOES NOT JOIN is absolutely void under a statute declaring that no conveyance affecting the homestead of a married man shall be of any validity unless his wife joins in the execution thereof.

HOMESTEAD.—IF AN ATTACHMENT IS LEVIED UPON A HOMESTEAD, and such homestead is subsequently abandoned, the attachment becomes operative from the date of its levy, and takes precedence over subsequent conveyances of the property.

SUIT by J. B. and Alfred Williams against M. F. Lake, in which an attachment was issued and levied on the fifteenth day of January, 1890, upon certain real property. One Pipkin interpleaded in this action, claiming that the property upon which the attachment was levied was not subject thereto, and was in fact his property. On and prior to January 9, 1890, the property was the homestead of Lake and his wife, and on the day last named a conveyance thereof was made, signed by both the husband and wife, purporting to convey the property to Pipkin, but she was not named in the deed as a grantor, and the only language of the deed apparently referring to her was that in which she relinquished her right of dower. On December 2, 1890, Lake and his wife executed a second conveyance to Pipkin which was in due form. The trial court determined that the attachment upon the property was valid, and Pipkin appealed.

The appellant, *pro se*.

T. P. Winchester, for the appellees.

245 HEMINGWAY, J. It seems to be conceded that up to the 9th of January, 1890, the land in controversy was the legal homestead of the defendant, Lake. On that day he executed a deed of it to his codefendant, Pipkin, and left it. On the 15th of January, 1890, the plaintiffs caused it to be attached as the property of Lake, and the attachment was sustained. Pipkin filed an interplea, claiming the property as against the attachment. He does not question the correctness of the judgment sustaining the attachment against Lake, but claims that he had acquired the property before the attachment issued, and that it was therefore not liable to levy or sale under process or judgment against Lake.

If he had in fact acquired the property, his position is well taken; but if the deed of January 9th passed nothing, he shows no right to resist the sale of the land.

The court in effect charged the jury: 1. That a partner could not claim a homestead exemption out of firm property

as against firm creditors; and 2. That if the deed to Pipkin was made without consideration, it was void as against the firm creditors.

It is here insisted, properly, as we think, that there was error in each instruction. The property belonged to Lake individually, not to the firm; the first instruction was therefore inapplicable to the case, and, being calculated to confuse, if not to mislead, the jury, should not have been given. The land was Lake's homestead, free from the claims of his general creditors, and he could sell it or give it away at pleasure, without prejudicing any right of theirs; and if in fact he did sell or give it away by a conveyance valid as against himself, they could not attack it; for, as they had no right to resort to ²⁴⁶ the land, they were deprived of nothing, and in no manner defrauded by any disposition he might have made: *Bogan v. Cleveland*, 52 Ark. 101; 20 Am. St. Rep. 158. The second instruction was therefore erroneous in principle.

But although these errors were committed it does not follow that the case should be reversed; for if the interpleader showed that he had acquired no interest in the land, he was not prejudiced by the errors, and is in no position to ask a reversal. It therefore becomes necessary to consider whether the title to the land passed by the deed of January 9, 1890; and, if it did not, whether the deed of December 2, 1890, which was designed to cure the former deed, passed the title as against plaintiff's intervening attachment.

The first deed was sufficient to pass the title, if it was not void for a failure to comply with the provisions of the act of March 18, 1887, entitled, "An act to render more effectual the constitutional exemption of homestead." Its provisions, in so far as they affect this case, are as follows: "That no conveyance, mortgage, or other instrument affecting the homestead of any married man shall be of any validity, . . . unless his wife joins in the execution of such instrument, and acknowledges the same": Acts 1887, p. 90. The question then is whether the deed met the requirements of this act, and, if not, how far it was void on account of its failure in that regard.

The requirements of the act are two: 1. That the wife shall join in the execution of the deed; and 2. That she shall acknowledge it. It demands substantive acts only, and prescribes no particular manner of performing them. If she

actually join in executing the deed, and then acknowledge its execution before an officer authorized to certify acknowledgments, she has done all the substantive acts required, and as the statute prescribed no form or manner of doing them, there can be no ²⁴⁷ noncompliance with its provisions for matter of form merely. Whenever a substantial compliance appears the statute is satisfied, and the deed will be valid. But while form is immaterial, the acts prescribed are prerequisites, and, where they do not appear in a deed, it comes within the condemnation of the statute. Under the rule stated, we cannot find that Mrs. Lake joined in the execution of the deed. It is in form a deed poll, and its premises indicate that M. F. Lake is the sole grantor.

The name of his wife does not appear in the granting part, nor elsewhere in the body of the deed; it appears only after the usual covenants of warranty, in a clause which declares that she releases to the grantee all her right or possibility of dower. If this clause were not in the deed, it would perhaps be proper to hold that the fact of her signing it evidenced an intention to join in its execution, and give it whatever effect might legally result from her executing it; but it expressly declares what her purpose was, and restricts the operation of the deed as against her to the release of her dower. It has been held, under statutes upon the same subject, for a similar purpose, and of like provisions to our own, that the grant should contain express reference to the homestead; but a less rigorous rule perhaps prevails: *Dooley v. Villalonga*, 61 Ala. 129; *Poole v. Gerrard*, 6 Cal. 71; 65 Am. Dec. 481, and note 488; *In re Cross*, 2 Dill. 320. But, so far as our investigation has extended, no conveyance has been held valid, under a similar statute, in which the only mention of the wife as a grantor was in a clause whereby she expressly released her dower and nothing more; and in a number of such cases it has been held that the deed was invalid: *Poole v. Gerrard*, 65 Am. Dec. 488, note; *Wing v. Hayden*, 10 Bush, 276; *McGrath v. Berry*, 13 Bush, 391; *Herbert v. Kenton Building etc. Assn.*, 11 Bush, 296; *Long v. Mostyn*, 65 Ala. 543; *Wilson v. ²⁴⁸ Christopher-son*, 53 Iowa, 481; *Greenough v. Turner*, 11 Gray, 332.

As the cases cited seem to reflect an established rule, and be right upon principle, we think the deed invalid because Lake's wife did not join in its execution. It is perhaps proper to say that, as it appears, from the certificate of an officer authorized to take acknowledgments of deeds, that she stated to

him that she had voluntarily signed it, we are of opinion the acknowledgment is sufficient, within the statute under consideration, notwithstanding it is not in the form which the statute prescribes in other cases, and might not be sufficient to bar her right of dower.

As the deed did not answer the requirements of the statute, the question is, how far it was invalid; whether it was valid, according to its import, except as against those entitled to claim the homestead exemption, or as a conveyance of the fee subject to the right of homestead.

This branch of the case has been the subject of much discussion among the judges, and the brevity with which it is here treated is in marked contrast with the time consumed and the authorities read and considered in the course of determining it.

The language of the statute is that no deed not made as it prescribes "shall be of any validity." If the terms be given their natural signification, such deeds are made invalid to every extent and as to all persons; for, if they are held to carry the reversion, or to be operative as against any person or class of persons, they are to some extent valid, and not, as the statute ordains they shall be, without "any validity."

The decided weight of authority is that such deeds are void absolutely, not relatively; that they are mere nullities, and leave the property as if they had not been made: *Jenkins v. Harrison*, 66 Ala. 345; *Long v. Mostyn*, 65 Ala. 543; *Richardson v. Woodstock Iron Co.*, 90 Ala. 266; ²⁴⁹ *Alley v. Bay*, 9 Iowa, 509; *Goodrich v. Brown*, 63 Iowa, 247; *Bruner v. Bateman*, 66 Iowa, 488; *Morris v. Ward*, 5 Kan. 239; *Ott v. Sprague*, 27 Kan. 620; *Lear v. Totten*, 14 Bush, 103; *Tong v. Eifort*, 80 Ky. 153; *Richards v. Chace*, 2 Gray, 383; *Eldridge v. Pierce*, 90 Ill. 474; *Dye v. Mann*, 10 Mich. 291; *Amphlett v. Hibbard*, 29 Mich. 298-305; *Sherrid v. Southwick*, 43 Mich. 515; *Cummings v. Busby*, 62 Miss. 195; *Ferguson v. Mason*, 60 Wis. 389.

It has been held by several courts whose opinions are entitled to and receive great respect that such deeds are invalid only in so far as they attempt to convey the homestead right or vest the right of possession while the homestead continues, and that they are valid as conveyances of the estate subject to such right and vest a right to possession when the right of homestead expires: *Smith v. Provin*, 4 Allen, 516; *Gunnison*

v. *Twitchel*, 38 N. H. 70; *Brown v. Coon*, 36 Ill. 243; 85 Am. Dec. 402; *Stewart v. Mackey*, 16 Tex. 58; 67 Am. Dec. 609.

There are several objections to adopting that construction of our statute. In the first place, it is not the natural import of the terms used; in the second place, it would hinder, rather than promote, the design of the law, by enabling the husband alone to alien the fee and thereby impair the value of the exemption and jeopardize the permanent enjoyment of a homestead which the law designed should not be parted with without the wife's concurrence; in the next place, this court held, under a somewhat similar provision in the constitution of 1868, that mortgages were void *in toto*, and not void only in so far as they affected the homestead right; and in the last place, it is the policy of our homestead laws to protect the title, as well as the possession and use, of the homestead, as is shown in the rule that forbids the sale of the reversion, either under execution during the husband's life, or under order of the probate court after ²⁵⁰ his death. We cannot, therefore, adopt this construction.

The construction which would hold the deed void as to those entitled to the exemption, but valid as to others, is liable to the objection that it validates for many purposes what the statute says shall not be valid for any purpose, and moreover, is directly opposed to the construction that had been placed upon similar statutes in other states before ours was adopted: *Bolton v. Oberne*, 79 Iowa, 278; *Alford v. Lehman*, 76 Ala. 526; *Richardson v. Woodstock Iron Co.*, 90 Ala. 266; *Richards v. Chace*, 2 Gray, 383.

But another objection to that interpretation, more cogent in the minds of some of the judges than those mentioned, is that it would permit the husband to hold as exempt from his debts property not otherwise exempt merely because it had once been his homestead, and he had made an attempt to convey it. If the deed was void as to him, the land remained his after the deed was made, and if he removed from it and it ceased to be his homestead, it would, under the general law, become liable to his debts; but if the deed is held operative as against his creditors, they are precluded from enforcing their claims against it, although he might be at liberty to recover it at will. The legislature certainly never intended by the act under consideration to preserve the property in him and also to exempt it from liability for his debts when it ceased to be his homestead, for this would give to a deed de-

clared to be invalid merely the effect to preserve a valuable exemption that would otherwise be lost by removal; and as the terms of the act do not import such intention, it should not be given that meaning by construction.

Our conclusion is that the deed as a grant was a nullity, and left the title as though it had never been made. What effect, then, had the deed of December, 1890? ²⁵¹ When the homesteader with his family abandoned the land as a homestead it became liable to attachment for his debts; and when the attachment was sustained it related back to the date of the lien of the writ, antedating this deed, and gave plaintiffs a lien prior in law to the title acquired under it.

Under any view of the case, the interpleader asserted no right that was in law prior to the lien of the plaintiffs' judgment, and could not have been prejudiced by any error in instructing the jury. The judgment was right, and is therefore affirmed.

As is well known, there are two radically different opinions with respect to the attaching of judgment, executions, and attachment liens against property which is exempt from forced sale as a homestead. The view sustained by the minority is that the homestead exemption is a mere personal right of the claimant by virtue of which the property is for the time being withdrawn from forced sale, and the judgment or other lien is deemed to attach notwithstanding the exemption right, and to remain in abeyance only so long as the right continues capable of assertion by the homestead claimant. Therefore, if he sells the property and thus parts with his right to insist upon its exemption, it at once becomes liable to sale under the judgment or other lien existing against him: *Hoyt v. Howe*, 3 Wis. 753; 62 Am. Dec. 705; *Whitworth v. Lyons*, 39 Miss. 467; *Allen v. Cook*, 26 Barb. 374; *Smith v. Brackett*, 36 Barb. 571; *Folsom v. Carl*, 5 Minn. 333; 80 Am. Dec. 429; *Trustees v. Schell*, 17 Wis. 308; *Tillotson v. Millard*, 7 Minn. 513; 82 Am. Dec. 112. The majority opinion is that a judgment or like lien cannot be created except when there is a right to sell property thereunder, and that when the right of sale cannot be asserted, the existence of the lien must be denied, and therefore that though a judgment lien exists against the claimant, or an attachment or execution has been attempted to be levied upon the homestead property, such lien or levy is absolutely void as against such property, and therefore a vendee of the claimant acquires title unaffected by the judgment or other lien; *Holland v. Kreider*, 86 Mo. 59; *Ackley v. Chamberlain*, 16 Cal. 181; 76 Am. Dec. 516; *Bowman v. Norton*, 16 Cal. 214; *Marriner v. Smith*, 27 Cal. 649; *Deffeliz v. Pico*, 46 Cal. 289; *Englebrecht v. Shade*, 47 Cal. 627; *Green v. Marks*, 25 Ill. 221; *Hume v. Gossett*, 43 Ill. 297; *Bonnell v. Smith*, 53 Ill. 377; *Coe v. Smith*, 47 Ill. 225; *McDonald v. Crandall*, 43 Ill. 221; 92 Am. Dec. 112; *Lamb v. Shays*, 14 Iowa, 567; *Parker v. Dean*, 45 Miss. 409; *Bliss v. Clark*, 39 Ill. 590; 89 Am. Dec. 330; *Fishback v. Lane*, 26 Ill. 437. It is somewhat difficult to determine from the decision in the principal case in which of these views the supreme court of Arkansas concurred. We are not able, from its opinion, to understand whether it regarded

the homestead right of the defendant Lake as absolutely terminating upon his surrender of possession at the time of the making of the deed on January 9, 1890, or whether it regarded the homestead exemption as continuing, notwithstanding such surrender, until a valid conveyance was made of the property by Lake and his wife in December following. While the constitution of Arkansas provides for the exemption of homestead property, it does not require the property claimed as a homestead to be designated in any particular manner, or to be the subject of any declaration or description filed in the office of the county recorder or otherwise: Ark. Const., art. 9, secs. 3-10. Neither does the constitution make any provision with respect to the abandonment or the conveyance of a homestead, nor can we find any provision in the statutes of Arkansas indicating that a homestead can be abandoned by removal from the property or by any other means. The statute does not require any declaration of abandonment, nor, on the other hand, does it require, apparently, any continuous use, or any use at all, of the property as a homestead. The most recent statute, so far as we are aware, upon the subject, and certainly the one under which the decision in the principal case was made, is to be found at page 90 of the statutes of the year 1887. It declares that the right is not lost by omission to claim it before the sale of the property under execution, nor by failure to file any description in the recorder's office; that the defendant may interpose his claim at any time before or after the sale on execution, except that, if he does not reside on the property, and is the owner of more land that can be held as a homestead, either he or his wife must make the claim of exemption before such sale. It does not appear in the principal case that the defendant Lake owned any more land than he might have claimed as a homestead, and therefore, it would appear, though he had surrendered possession of the property, that both he and his wife retained the right to claim it as exempt from execution until they had parted with all interest in it by the conveyance of December, 1890, and therefore, as the homestead still continued in existence when the attachment was levied on the 15th of January preceding, that the court must have regarded the homestead as subject to the attachment lien, and such lien as merely remaining in abeyance until the claimants should part with their interest in the property, or rather, with their right of exemption therein, and thereby render it subject to execution sale.

HOMESTEAD—CONVEYANCE—VALIDITY OF AS TO CREDITORS.—A sale of a homestead cannot be fraudulent as to a creditor of the claimant, since such creditor has no interest therein, which may be taken in payment for his debts: *Hodges v. Winston*, 95 Ala. 514; 36 Am. St. Rep. 241, and note. See, also, the note to *Pike v. Miles*, 99 Am. Dec. 152.

HOMESTEAD—NECESSITY FOR JOINDER OF WIFE.—See the extended notes to *Alt v. Banholzer*, 12 Am. St. Rep. 683, and *Poole v. Gerrard*, 65 Am. Dec. 484. A conveyance of an interest in a homestead executed by the husband alone is invalid for any purpose: *McKenzie v. Shows*, 70 Miss. 388; 35 Am. St. Rep. 654, and note.

GATES v. SCHOOL DISTRICT.

[57 ARKANSAS, 370.]

EMPLOYER AND EMPLOYEE.—DAMAGES FOR THE WRONGFUL DISCHARGE BY AN EMPLOYER OF AN EMPLOYEE before the contract of service has terminated are, if an action is brought after the expiration of the term specified in the contract, presumed to be the contract price, and the burden is upon the defendant to rebut this presumption by proof that the damages sustained were actually less.

EMPLOYER AND EMPLOYEE.—THE DAMAGES RECOVERABLE FOR THE WRONGFUL DISCHARGE OF AN EMPLOYEE cannot be reduced by showing that because of such discharge he removed to another part of the country, where the living expenses of himself and family were less than in the the locality where he had been employed.

EMPLOYER AND EMPLOYEE.—THE DAMAGES RECOVERABLE FOR A WRONGFUL DISCHARGE of an employee may be reduced by proving that, after such discharge, he performed work on his own account, in his own business, incompatible with the performance of the service stipulated to be performed in the violated contract.

J. B. McDonough and Edgar E. Bryant, for the appellant.

Rogers and Read, for the appellee.

372 BATTLE, J. The school district of Fort Smith, in May, 1888, employed N. P. Gates to superintend its public schools for twelve months, commencing on the 1st of July, 1888, and ending on the 30th of June, 1889, and agreed to give to him for his services a salary of \$1,800 per annum, payable in monthly installments of \$150. He entered upon the discharge of his duties as such superintendent, and continued to discharge them from July 1st to November 7, 1888, when the school district discharged him without cause, and refused to allow him to act any longer as such superintendent, although he was willing and offered to perform his contract. On the 13th of February, 1891, he brought an action against the school district for \$335 for services actually rendered the defendant from September 1 to November 7, 1888, and for \$1,165 for damages sustained by him on account of the refusal of the defendant to permit him to fully perform his contract.

The defendant answered, saying that the plaintiff had failed after his discharge to make diligent and reasonable efforts to obtain employment in the line of his profession, and instead thereof removed to his farm in Washington county in this state, a distance of nearly one hundred miles from Fort Smith, and there devoted a part of the year to farming and improving his fruit farm, and was benefited by so doing in

the sum of \$1,200; and insisted that this amount should be deducted from any damages the plaintiff might recover.

³⁷³ In the trial of the action, the court gave to the jury an instruction numbered ten, and in the following language: "You are instructed that whatever plaintiff earned by his labor and the benefits received therefrom upon his farm, and whatever benefits he received by reason of his labor, residence upon, and personal supervision of, his farm, should be deducted from the contract price in estimating plaintiff's damages."

And also gave an instruction numbered eleven, in the words following: "You are instructed that the necessary expenses in carrying out plaintiff's contract with defendant that were saved by plaintiff and rendered unnecessary by his removal to his farm should be deducted from the damages recovered by the plaintiff."

And instructed them to return special verdicts in answer to the following questions: "No. 1. What do you assess, if any, under court's instruction number eleven, for the amount of the expenses saved by plaintiff by his removal from Fort Smith to his farm?" No. 2. What amount, under court's instruction number ten, do you assess for whatever was earned by plaintiff by his labor and benefits he received by reason of his labor, residence upon, and personal supervision of, his farm?"

The jury returned into court a verdict as follows: "We, the jury, find for the plaintiff in the sum of \$335, with interest from November 7, 1888, at the rate of six per cent per annum; and we, the jury, find for the plaintiff in the sum of \$768, with interest from June 30, 1889, at the rate of six per cent per annum.
H. M. TATE, Foreman."

And answered the questions propounded to them by saying in reply to the first, \$48, and to the second, \$349. The plaintiff thereupon moved for a judgment for the sums found for him in the general verdict, and the \$349, and \$48 and interest thereon, but the court denied the ³⁷⁴ motion, and rendered a judgment in accordance with the general verdict.

Plaintiff presented his bill of exceptions, which was signed and made a part of the record; and he appealed to this court without filing a motion for a new trial.

The general verdict and special findings of the jury clearly show the facts upon which the judgment of the court was based. The error complained of by the appellant is, the fail-

ure of the court to pronounce judgment according to such facts and the law of the case. He insists that judgment should have been rendered in his favor against the appellee for the \$335 and \$1,165, and interest, without deduction; and this is the only error of which he complains. Inasmuch as the facts upon which this complaint is predicated appear in the verdicts of the jury, upon which the judgment of the court was rendered, no motion for a new trial was necessary to bring it before this court for review: *Mansfield's Digest*, sec. 5143; *Smith v. Hollis*, 46 Ark. 17; *Louisville etc. R. R. Co. v. Brice*, 84 Ky. 208.

Did the court err? When one contracts to employ another for a stated time, at a certain compensation for the whole period, and discharges him without cause before the expiration of the time, he is liable for damages. If the employee sues after the term of service has expired, the contract price is *prima facie* the measure of the damages he is entitled to recover. He is entitled to recover it, unless the defendant, by evidence, shows that the damages sustained were actually less: *Walworth v. Ibol*, 9 Ark. 394; *Costigan v. Mohawk etc. R. R. Co.*, 2 Denio, 609; 43 Am. Dec. 758; *Gillis v. Space*, 63 Barb. 177; *Jaffray v. King*, 34 Md. 217; *King v. Steiren*, 44 Pa. St. 105; 84 Am. Dec. 419.

The fact the appellant was discharged without cause, before the expiration of the time for which he was employed, and his right to recover his wages, are established by the verdict. But the jury found that he curtailed ^{\$75} his expenses, after he was discharged, by removing from Fort Smith to his farm, and the appellee contends that it is entitled to a reduction in the damages recoverable against it to the extent they were reduced. Is it entitled to the reduction?

To support its contention appellee cites *Brodie v. Watkins*, 33 Ark. 545, 34 Am. Rep. 49. Turner, an attorney, was employed to bring that action to enforce the collection of a claim. He was to receive ten per cent of the amount collected. It was necessary for him to bring the action in a distant county. To render the services he contracted to perform, he was compelled to leave home and incur expenses in the way of traveling and hotel bills. He was discharged without cause during the pendency of the action. He offered to perform his contract. When judgment was recovered, he claimed a lien on it for the ten per cent he was to receive; and the court held that he was entitled to recover it, less the said expenses he

would have incurred in the event he had performed the stipulated services.

The principle upon which the compensation of Turner in *Brodie v. Watkins*, 33 Ark. 545, 34 Am. Rep. 49, was reduced is not applicable to a case like this. Turner was compelled to leave home to perform his contract. Had he reduced his expenses of living at home on account of his discharge, his client would not have been entitled to the benefit of the reduction in the way of a credit on the fee he was to pay. Such expenses would have constituted no part of the cost of the performance of the contract. They depended on circumstances wholly independent of the contract, and may have been as great or small as Turner had the will and ability to make them.

While Gates was performing his contract he resided at Fort Smith. He had the right to reside there. His contract with the appellee did not bind him expressly or impliedly to regulate his expenses in any particular manner. ³⁷⁶ All it was entitled to from him was the faithful performance of their contract on his part, and he to the reward he was to receive for his services. His expenses were none of its concern, and affected it in no manner. He had the right to regulate them as he had the will and ability to do, and to indulge in the luxuries and comforts of life, according to his capacity. His discharge did not affect his right or duty to do so, but limited his financial ability, and thereby his control over his expenses. For the comforts, pleasures, and luxuries he may have denied himself and family by reason thereof the appellee is entitled to no reduction in the damages for which it may be liable. He is not indebted to it in any way for the enforced frugality. For the hardships or denials imposed, or change of residence made necessary, by its wrongful acts, it is entitled to no reward.

The jury also found that the value of Gates' labor upon his farm and his supervision of the same was forty-eight dollars, and deducted this amount from his damages. The authorities are not agreed as to the appellee's right to this reduction. In *Harrington v. Gies*, 45 Mich. 374, the right is denied, and in *Huntington v. Ogdensburgh etc. R. R. Co.*, 33 How. Pr. 416, it is sustained. But the better rule seems to be, the deduction ought to be made if the work performed on his own account was incompatible with the performance of the service stipulated to be performed under the violated contract; other-

wise it should not. In that way he would recover the damages actually sustained: *Jaffray v. King*, 34 Md. 222; 2 Sedgwick on Damages, 8th ed., sec. 667.

Whether the work performed by Gates on his own account was compatible with the service he contracted to do for the appellee does not appear in the verdict or special findings of the jury. Placing a fair and reasonable construction on the findings of the jury which is ³⁷⁷ most favorable to the judgment of the court, as we should, the reduction was properly made.

According to the verdict and special findings of the jury, judgment for the three hundred and forty-nine dollars and six per cent per annum interest thereon from the 1st of July, 1889, should have been rendered in favor of the appellant against the appellee in addition to the amounts recovered; and it is so ordered.

MASTER AND SERVANT—DAMAGES FOR WRONGFUL DISCHARGE OF SERVANT.—A master discharging a servant before the end of the period, when the hiring is for a definite term, is liable for wages for the full time: *Ferreira v. Sayres*, 5 Watts & S. 210; 40 Am. Dec. 496, and note; *Decamp v. Hewett*, 11 Rob. 290; 43 Am. Dec. 204, and extended note; *Webster v. Wade*, 19 Cal. 291; 79 Am. Dec. 218, and note; *Emery v. Steckel*, 126 Pa. St. 171; 12 Am. St. Rep. 857, and note; *Hinchcliffe v. Koontz*, 121 Ind. 422; 16 Am. St. Rep. 403; note to *Cox v. Beurden*, 20 Am. St. Rep. 362; *Moss v. Decatur Land &c. Co.*, 93 Ala. 269; 30 Am. St. Rep. 55, and note; *contra*: See *Ream v. Watkins*, 27 Mo. 516; 72 Am. Dec. 283. A servant wrongfully discharged before the end of his term may elect to treat the contract as rescinded, and sue on a *quantum meruit*, or he may sue for an entire breach of the contract, and recover all damages sustained up to the trial; or he may wait until his wages would mature under the contract, and sue and recover as upon performance on his part: *Liddell v. Chidester*, 84 Ala. 508; 5 Am. St. Rep. 387, and note. That he may treat the contract as rescinded, and sue on a *quantum meruit*, see *Mt. Hope Cemetery Assn. v. Weidenmann*, 139 Ill. 67, and *O'Brien v. Sexton*, 140 Ill. 517. Though suit be brought before the term of hiring has ended, yet the recovery may embrace all the damages down to the expiration of the term, the trial being had after the whole of such damages became susceptible of positive proof: *Roberts v. Rigden*, 81 Ga. 440.

CATLETT v. RAILWAY COMPANY.

[57 ARKANSAS, 461.]

A RAILWAY CORPORATION IS NOT BOUND TO KEEP A LOOKOUT TO PREVENT BOYS FROM SWINGING ON THE LADDERS OF ITS MOVING FREIGHT TRAINS, and its failure to do so is not negligence.

RAILWAY CORPORATIONS—A SLOWLY MOVING FREIGHT TRAIN is not a dangerous machine, alluring to boys, so as to impose upon a railway corporation the duty of watching to see that no boy in stealing, or attempting to steal, a ride thereon is injured. To a boy who thus rides, or attempts to ride, the company owes no duty save not to injure him wantonly.

JURY TRIAL—POWER OF THE COURT TO DIRECT A VERDICT.—The declaration in a state constitution that judges shall not charge juries with regard to matters of fact, but shall declare the law, does not deprive the judge of the power to direct the verdict when there is no evidence to support the cause of action or of defense.

JURY TRIAL.—THE LEGAL SUFFICIENCY OF THE EVIDENCE to warrant a verdict is a question of law which the court must decide. It matters not when or how it arises. And if the evidence offered by the plaintiff is not such as could support a verdict in his favor, the jury have no duty to perform, and the judge should tell them so, and direct them to return a verdict for the defendant.

N. W. Norton, for the appellant.

Dodge and Johnson, for the appellee.

464 COCKRILL, C. J. A railway company is not bound to keep a lookout to prevent boys from swinging on the ladders of its moving freight trains; and its failure to do so is not negligence: *Bishop v. Union R. R. Co.*, 14 R. I. 314; 51 Am. Rep. 386; *Chicago etc. R. R. Co. v. Stumps*, 69 Ill. 409; *St. Louis etc. Ry. Co. v. Ledbetter*, 45 Ark. 246; *Hestonville etc. Ry. Co. v. Connell*, 88 Pa. St. 520; 32 Am. Rep. 472.

If boys have stolen rides in that way at a given point without remonstrance from the company's trainmen, ⁴⁶⁵ that fact does not amount to an invitation to do so on other occasions. The boy who attempts it is a trespasser, and the company owes him no duty save not to injure him wantonly: *Daniels v. New York etc. R. R. Co.*, 154 Mass. 349; 26 Am. St. Rep. 253; *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377; 30 Am. Rep. 686; *Wright v. Boston etc. R. R. Co.*, 142 Mass. 296; *Rodgers v. Lees*, 140 Pa. St. 475; 23 Am. St. Rep. 250, and cases cited; *Shelton v. St. Louis etc. Ry.*, 60 Mo. 412; *Duff v. Alleghany R. R. Co.*, 91 Pa. St. 458; 36 Am. Rep. 675; *Chicago etc. Ry. Co. v. Smith*, 46 Mich. 504; 41 Am. Rep. 177.

The appellant argues that a slow moving train is "dangerous machinery," alluring to boys; and that it is therefore

negligent of the company to fail to take precaution to keep them off such trains. That is the argument made to sustain a class of cases known as the "Turn-table Cases," the leading one of which is *Railroad Co. v. Stout*, 17 Wall. 657. The doctrine of those cases has been much criticised and doubted, and by some courts repudiated: See *Daniels v. New York etc. Ry. Co.*, 154 Mass. 349; 26 Am. St. Rep. 253; Patterson's Railway Accident Law, sec. 196. Whatever its merits may be, it has never been extended to such length as to control a case like this: See *Bishop v. Union R. R. Co.*, 14 R. I. 314; 51 Am. Rep. 386; *Shelton v. St. Louis etc. Ry.*, 60 Mo. 412.

The youth of the person injured will sometimes excuse him from concurring negligence, but no amount of youthful recklessness can supply the place of proof of negligence on the part of a defendant sought to be charged on account of negligence: Patterson's Railway Accident Law, sec. 75.

There was no proof of negligence on the part of the company. There was, therefore, nothing for the jury to consider. The court so informed the plaintiff when the evidence was all in, and gave him the opportunity to take a nonsuit, but he elected to stand upon the legal sufficiency of his proof, and the court directed a verdict for the defendant.

466 The constitution provides that "judges shall not charge juries with regard to matters of fact, but shall declare the law": Art. 7, sec. 23.

This provision shears the judge of a part of his magisterial functions, but it confers no new power upon the jury. It was the jury's province before this provision was ordained to pass only upon questions of fact upon which there was some real conflict in the testimony, or where more than one inference could reasonably be drawn from the evidence.

The constitution has not altered their province. It commands the judge to permit them to arrive at their conclusion without any suggestion from him as to his opinion about the facts. As Judge Battle expressed it in *Sharp v. State*, 51 Ark 155, 14 Am. St. Rep. 27, "the manifest object of this prohibition was to give the parties to the trial the full benefit of the judgment of the jury, as to facts, unbiased and unaffected by the opinion of judges." If there is no evidence to sustain an issue of fact, the judge only declares the law when he tells the jury so.

"The legal sufficiency of proof, and the moral weight of legally sufficient proof are very distinct in legal idea. The

first lies within the province of the court, the last within the province of the jury": *Wheeler v. Schroeder*, 4 R. L. 383. It was said in the case of the *Little Rock etc. Ry. Co. v. Henson*, 39 Ark. 419, that this provision prohibited the judge from directing a verdict for either party, but the other decisions of the court show that the rule there announced is limited to cases where there is some evidence to sustain the issue. Before and after that case was decided, the court, through Chief Justice English, said the practice of directing a verdict was improper "except in cases where there is no evidence to sustain the cause of action, or defense, and the court can say so as matter of law, it being the province of the jury to judge of the facts, and of the court to declare the law": ⁴⁶⁷ *Overton v. Matthews*, 35 Ark. 155; *Little Rock etc. Ry. Co. v. Barker*, 39 Ark. 499.

In *Jones v. State*, 52 Ark. 347, it was said the trial judge should in no case indicate an opinion as to what the facts establish, but that the court must necessarily determine whether there is any evidence at all to establish a given fact in deciding whether a request for a charge based upon a case hypothetically stated should be given or not.

In *Cline v. State*, 51 Ark. 140, it was ruled that the provision of the constitution did not prohibit the judge from telling the jury that a certain fact was proved when it was in effect admitted by the parties or there was no evidence to contradict it and nothing from which a different inference could be drawn.

In *Little Rock etc. R. R. Co. v. Perry*, 37 Ark. 193, Judge Eakin for the court, said: "If there is any evidence whatever, however slight, pertinent to the issue, it should not be taken from the jury, even if the court is satisfied that it would grant a new trial if the verdict were found upon it"; and he said that was the effect of the former rulings of this court. But the same learned judge, in the case of *Oliver v. State*, 34 Ark. 639, explained that the scintilla doctrine has never prevailed in this state. We take it, therefore, that "any evidence, however slight," as used by him, does not mean a scintilla merely.

In *Richardson v. State*, 47 Ark. 567, Judge Smith says: "It is the duty of the trial court to set aside a verdict which is clearly against the weight of the evidence," and that injunction cannot be too often repeated; for, as he further explains, when the questions of fact reach us, we do not undertake to revise the discretion of the circuit judge in that respect, but

inquire merely whether there is a failure of proof on a material point. That is the marked distinction between the duty resting ⁴⁶⁸ upon the trial and the appellate courts. To ascertain whether there is a failure of proof, or whether the evidence is legally sufficient to warrant a verdict, the test is as follows: After drawing all the inferences most favorable to the verdict that the evidence will reasonably warrant, is it sufficient in law to sustain the verdict?

The terms "some evidence," "any evidence," "any evidence whatever," and "any evidence at all," as used in the opinions, all mean evidence legally sufficient to warrant a verdict. The legal sufficiency of evidence in that sense is a question of law, and the court must decide it, it matters not when or how it arises. The test that is applied by this court in determining the legal sufficiency of the evidence to sustain a verdict justified the trial court in reaching the conclusion that there was no proof of negligence. The conclusion followed as matter of law that no recovery could be had upon any view that could be taken of the facts which the evidence could be said to tend to establish. The question of negligence was therefore one of law for the court to decide: *Texas etc. Ry. Co. v. Cox*, 145 U. S. 593; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408.

As the evidence is not legally sufficient to sustain a verdict for the plaintiff the jury had no duty to perform, and it was the judge's duty to tell them so, as he did.

When the whole case appears to have been developed—that is, the plaintiff has adduced evidence tending to prove all the facts obtainable to sustain his complaint—and the undisputed evidence is so conclusive that this court would be compelled to reverse the judgment based upon a verdict in his favor, the court should withdraw the case from the jury, and direct a verdict for the defendant. That was the condition of this case. If it is probable in any case that the missing link can be supplied, a nonsuit would be the proper practice.

⁴⁶⁹ When a judgment is reversed in this court because of no evidence to sustain the verdict, and the cause appears to have been fully developed, it has grown to be the practice since the act of April 14, 1891, to dismiss the suit instead of remanding the cause for a new trial. It is the duty of the courts to prevent parties from being harassed by suit after it appears that the suit can be of no profit to the plaintiff.

Affirm.

RAILROADS—LIABILITY TO BOYS TRESPASSING ON TRAINS.—Railroad companies are not liable for injuries received by trespassing boys while jumping on and off its moving cars: *Hestonville etc. Ry. Co.*, 88 Pa. St. 520; 32 Am. Rep. 472; *Central etc. R. R. Co. v. Henigh*, 23 Kan. 347; 33 Am. Rep. 167; *Bishop v. Union R. R. Co.*, 14 R. L. 314; 51 Am. Rep. 386; *Curley v. Missouri Pac. Ry. Co.*, 98 Mo. 13. A railroad company is not liable for failing to ascertain that a boy of tender years is stealing a ride on the back footboard of a switch engine: *Oregon Ry. etc. Co. v. Egley*, 2 Wash. 409; 26 Am. St. Rep. 860, and note. A railroad company is not answerable to a trespasser on its trains for negligence, and owes him no duty other than that of doing him no wanton or willful injury: *Richmond etc. R. R. Co. v. Burnard*, 70 Miss. 437; 35 Am. St. Rep. 656, and note.

TRIAL—DIRECTING VERDICT.—When the evidence given at a trial with all the inferences that the jury could justifiably draw from it is insufficient to support a verdict for the plaintiff, so that such verdict if returned must be set aside, the court may direct a verdict for the defendant: *Woolhine v. Chesapeake etc. Ry. Co.*, 36 W. Va. 329; 32 Am. St. Rep. 859, and note with the cases collected.

HUTCHINSON v. OZARK LAND COMPANY.

[57 ARKANSAS, 554.]

TAXATION—THE TAX FOR COUNTY PURPOSES MUST BE ON THE ENTIRE COUNTY.—It is not within the power of the legislature to divide the county into taxing districts, and thereby to authorize the levy of a greater tax in one part of the county than in another, for a purpose which is not local, but is purely a county purpose, if there is a provision in the state constitution exacting uniformity of taxation.

E. F. Brown, for the appellants.

John B. Jones, for the appellee.

556 MANSFIELD, J. By an act of the general assembly, approved February 23, 1881, two judicial districts were formed out of the territory embraced within the boundaries of Clay county, and provision was made for holding in each of them separate terms of the circuit and probate courts. One of these districts is called the "eastern district," and includes the county seat. The other is called the "western district," and embraces about one-third of the territory of the county. The 18th section of the act is as follows: "The clerk . . . shall keep two financial records, in one of which he shall keep a true and perfect record of the financial affairs of the eastern district; and in the other he shall keep a similar record for the western district. The financial affairs of each district shall be kept as separate and distinct as though the two districts were separate and distinct counties." Section 19 pre-

vides: "That all revenue accruing to the county of Clay from the sale of forfeited state and county lands, liquor and ferry license, and from all other sources whatsoever, shall be used for the exclusive benefit of the district in which such revenue may arise." And section 20 requires the collector, in making deposits of county funds with the treasurer, to take his receipts specifying the district to which the funds deposited belong.

⁵⁵⁷ The county court in the year 1886 levied a tax of five mills on the dollar for general county purposes on all the property in the eastern district, and a tax of only three mills on the dollar for like purposes on all the property in the western district. A tract of land belonging to the appellee and situated in the eastern district was sold for the nonpayment of the tax of five mills thus imposed upon it, and this suit was brought to avoid the sale on the ground that the tax was illegal. The court below granted the relief sought by the complaint; and the only question to be decided on the defendant's appeal is whether the tax levied for the eastern district was valid.

The objection to the tax is that it violates the rule of uniformity prescribed by the constitution, and to which all taxation in this state must conform: Const., art. 16, sec. 5; *Monticello v. Banks*, 48 Ark. 251; *Davis v. Gaines*, 48 Ark. 370; *Fletcher v. Oliver*, 25 Ark. 289. This is met by the argument that the legislature has made the two districts of Clay county taxing districts, and that as the tax levied on the property of the eastern district is at a uniform rate throughout that district, a less rate may, consistently with the constitution, be imposed upon the property of the western district. But it was not within the power of the legislature to create a district for the levy of the tax in question that did not embrace the whole county. The tax was for a county purpose, and its burden could not be imposed upon a part only of the county's territory: *People v. Salem*, 20 Mich. 474; 4 Am. Rep. 400; *Dyar v. Farmington Village Corp.*, 70 Me. 515; Cooley on Taxation, 141, 152.

"The district," says Judge Cooley, "for the apportionment of a state tax is the state, for a county tax the county, and so on." Such was the rule always observed in this state prior to the adoption of the present constitution, and when that instrument gave to the county ⁵⁵⁸ court "exclusive original jurisdiction in all matters relating to county taxes," and fixed

the maximum rate of those taxes, there is no reason for believing that it contemplated any tax not to be levied throughout the county. Taxing districts of less extent and embraced within the territory of a county are authorized by the constitution, but only for local improvement, school, and municipal purposes: Const., art. 14, sec. 3; art. 19, sec. 27. In citing *People v. Central Pacific R. R. Co.*, 43 Cal. 398, in support of a contrary view, counsel have probably overlooked the fact that the ruling in that case that a revenue district may "be less in extent than a county of which it is a part" was based on a constitutional provision not found in our constitution with any application to county taxes.

If the taxes levied in the two judicial districts of Clay county were not county taxes within the meaning of the constitution, then the county court had no power to levy them, and they were for that reason illegal. But if they were levied for county purposes, that made them county taxes, and the nature of such taxes required them to be imposed by a levy applicable to the entire county: Cooley on Taxation, 141, 152; *Pulaski Co. v. Reeve*, 42 Ark. 56. The expense of maintaining two judicial districts in a county is necessarily a county expense, and the revenue to pay it can be raised only by a county tax. Such a tax, to be valid, must be levied at a uniform rate upon all the taxable property of the county: Const., art. 16, sec. 5; Desty on Taxation, 175, 177; *Fletcher v. Oliver*, 25 Ark. 295; *Loftin v. Citizens' Nat. Bank*, 85 Ind. 345, 346; Cooley on Taxation, 244. In *Monticello v. Banks*, 48 Ark. 251, it was held that the occupied lots upon a street could not be assessed for paving the street in front of them without assessing for the same purpose vacant lots similarly situated. The exemption of the vacant lots, it was said, violated "the constitutional principle of uniformity" in the imposition of the burden."

For the same reason it was held in *Davis v. Gaines*, 48 Ark. 370, that a tax for a local improvement levied upon part of the lands to be benefited, to the exclusion of others of the same class, was void. But in principle there is no difference between a levy that exempts part of the territory of a county and one which imposes upon such part a tax at a lower rate than the rest of the county is required to pay; for the effect is an exemption in favor of the section on which the lower rate is levied as to so much of the difference between the two taxes as it ought to pay in order to equalize them. And in

the present case the eastern district of Clay county was not compensated for bearing the greater burden by any legal exemption of its property from taxation because of the county's liability for the expenses of the western district: *Dyar v. Farmington Village Corp.*, 70 Me. 515. All the affairs of the two districts are concerns of the county, and the expenses incurred in both, whether in the holding of courts or otherwise, constitute demands against the county; and a creditor of the county is not bound to look for payment alone to the district in which his claim arises. His claim being a debt of the county, a warrant issued upon its allowance is a county warrant, and as such the constitution makes it receivable for county taxes: Const., art. 16, sec. 10. It is difficult therefore to see what effect can be given to the financial provisions of the act quoted above. But in determining this cause it is sufficient to say that these provisions cannot be treated as having created separate taxing districts without holding that they impair the unity and power which the constitution secures to Clay county as a political subdivision ⁵⁶⁰ of the state: *Pulaski Co. v. Reeve*, 42 Ark. 56; *Bittle v. Stuart*, 34 Ark. 230; *Ex parte Jones*, 49 Ark. 113; *Patterson v. Temple*, 27 Ark. 202; *Worthen v. Roots*, 34 Ark. 356; Const., art. 13, sec. 1.

The tax in question was a county tax and void because of its inequality.

Affirmed.

TAXATION—UNIFORMITY.—The constitutional provisions regarding taxation require a general uniform levy for state purposes, but they do not forbid local taxation under general laws: *Anderson v. Kerns Draining Co.*, 14 Ind. 199; 77 Am. Dec. 63, and note. Taxation must be general and uniform. To exact from one county the entire revenue for the state would be equivalent to taking private property for public use: *City of Lexington v. McQuillan*, 9 Dana, 513; 35 Am. Dec. 159. The taxing power of the state attaches alike upon every thing that comes within its jurisdiction: *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 581, and note. The legislature of a state may apportion a public burden among all the taxpayers of a state or among all those of a particular section, if in its judgment those of a single section may reap the principal benefit from the proposed expenditure: *Cook v. Portland*, 20 Or. 580. See further the extended notes to *New Orleans v. Great Southern Teleph. etc. Co.*, 8 Am. St. Rep. 509, and *People v. Mayor*, 55 Am. Dec. 288.

GAVIN v. ARMISTEAD.

[57 ARKANSAS, 574.]

FRAUDULENT PURCHASERS.—It is not true that if a purchaser on credit has no reasonable expectation of being able to pay that this is equivalent to an intention on his part not to pay. Evidence that he had no reasonable expectation of being able to pay tends to prove that it was his intention not to pay, but whether such intention existed or not is a question of fact, which the jury must be permitted to determine.

W. G. Weatherford, for the appellant.

E. F. Adams and C. H. Trimble, for the appellee.

⁵⁷⁴ **HUGHES, J.** This is an appeal from a judgment in favor of the appellees in a suit brought by the appellants against them to recover possession of goods which, the appellants allege, had been bought of them by E. Buck, surviving partner of Buck and Trexler, merchants, who, ⁵⁷⁵ they allege, was at the time insolvent, and fraudulently concealed his condition, and represented that he was solvent, for the purpose of getting possession of the goods without paying for them, and with the intention not to pay for them. Buck had sold the goods to Armistead and Lundee, who had paid for his entire stock, including the goods in controversy, thirteen hundred dollars, and as part of the consideration for the sale had satisfied a large pre-existing debt they held against Buck.

It is contended that Armistead and Lundee were not *bona fide* purchasers; that if entitled to protection at all they are entitled to protection only for the sum of thirteen hundred dollars, the new consideration paid by them. No representation as to his solvency was made by Buck at the time he bought the goods. Those who sold the goods had sold him goods before then, and solicited him to buy at the time he bought the goods in controversy.

After the evidence was all in the court refused, at appellant's request, to instruct as follows:

"1. If the jury believe from the evidence that Buck procured the sale of the goods in suit by fraudulently concealing his insolvency, he was guilty of a fraud, which entitled the owner to disaffirm the sale and recover the goods.

"3. If the purchaser has no reasonable expectation of being able to pay for them, this is equivalent to an intention not to pay.

"5. If one takes property in payment of an existing debt, and also receives a small cash payment at the time, he is

only protected under the claim of being an innocent purchaser for value to the extent of the cash payment made at the time, and if the jury find that such purchaser has realized a sum equal to the cash paid, they are warranted in finding for the plaintiff."

The court, of its own motion, instructed:

⁵⁷⁶ "2. The mere fact, if found, that Buck was insolvent at the time of purchase from the plaintiffs is not sufficient to avoid the sale, for the law does not require an insolvent person to disclose his insolvency when he is not asked any thing by the seller concerning his insolvency or financial standing; but the jury must believe that Buck did not intend to pay for the goods at the time he purchased them.

"3. Even if it be proved that Buck, at the time of the purchase, had no reasonable grounds to believe that he would be able to pay for the goods, this will not, by itself, be sufficient to avoid the sale, unless the jury believe that Buck did not intend to pay for the goods; and in arriving at their conclusions on that point it is proper for the jury to consider his financial condition at the time, whether solvent or not; whether he had any reasonable grounds to believe that he would be able to pay for the goods, and all other facts proven in the case. And if from such circumstances they believe that he did not intend to pay for the goods, the sale is void as to all persons except innocent purchasers.

"4. A person purchasing goods from another who has obtained them through fraud will not be protected as an innocent purchaser, if the only consideration he has paid for the goods is a pre-existing debt, and the defendants in the case will not be protected as innocent purchasers, although they paid a portion of the consideration in cash, if the jury further find that they received on the purchase, in addition to the goods in controversy, other goods whose title is undisputed, and more than sufficient to reimburse them for the cash outlay."

Motion for new trial, because court refused each instruction asked, and because of the several instructions given of its own motion; finding of jury contrary to law; contrary to evidence; because plaintiffs were surprised ⁵⁷⁷ at defendant's evidence that no goods were hauled to warehouse on day following sale to Armistead.

Of the evidence, it is sufficient to say, that, in the opinion of the court, it is sufficient to support the verdict. Under the

rule long since settled in this court, a judgment will not be reversed here upon the weight of evidence, if there is legal evidence upon which the verdict might have been found.

We may as well say here that if there was error in the fourth instruction given by the court of its own motion, it was in the appellants' favor, and they cannot be heard to complain. This covers the fifth asked by appellants, and refused.

The second instruction given by the court of its own motion was clearly correct.

The only serious questions in the case arise upon the court's refusal to give instruction number three asked for by the appellants, and the giving of instruction number three of its own motion. Number three refused is: "If the purchaser has no reasonable expectation of being able to pay for them (the goods), this is equivalent to an intention not to pay." The counsel for appellants contend that this was held in the case of *Talcott v. Henderson*, 31 Ohio St. 162; 27 Am. Rep. 501. We do not so understand that case. It is true the court said in that case: "Hence, if a purchaser of goods has knowledge of his own insolvency, and of his inability to pay for them, his intention not to pay should be presumed. I would go a step further (says the judge), and hold that an insolvent purchaser without reasonable expectations of ability to pay, should be presumed to intend not to pay." But it is said in the same opinion, "An intention on the part of the purchaser of goods not to pay for them, existing at the time of purchase, and concealed from the vendor, is, unquestionably, such a fraud as will vitiate the contract. But it is as certainly true, on the other ⁵⁷⁸ hand, that, where no such fraudulent intent exists, the mere fact that the purchaser has knowledge that his debts exceed his assets, though the fact be unknown and undisclosed to the vendor, will not vitiate the purchase. Whether, therefore, a contract of purchase, where the purchaser fails to disclose his known insolvency, is fraudulent or not depends on the intention of the purchaser, and whether that intention was to pay or not to pay is a question of fact and not a question of law."

To tell the jury that the finding of the fact that the purchaser has no reasonable expectation of being able to pay for goods which he purchases is equivalent to finding that he did not intend to pay, is to instruct the jury upon the weight of the evidence, which the constitution of the state forbids. It is

true that such evidence would have a strong tendency to prove that it was the purchaser's intention not to pay, but as a matter of law it is not conclusive, and it is wrong to tell a jury that it is: Const., art. 7, sec. 23.

The first part of instruction number three given by the court is not happily framed, inasmuch as it tends to leave the impression that the jury could not find that the sale was vitiated by fraud from the fact alone that at the time of the purchase the purchaser had no reasonable expectation that he would be able to pay for the goods. But in the subsequent portion of the instruction the court told the jury that they must find that the purchaser did not intend at the time of the purchase to pay for the goods, before they could find that the purchase was fraudulent; and that, in arriving at their conclusion upon that point, it was proper for them to consider the financial condition of the purchaser at the time of the purchase, whether he was solvent or not, whether he had any reasonable ground to believe that he would be able to pay for the goods and all other facts proven in ⁵⁷⁹ the case. And that "if from such circumstances they believe that he did not intend to pay for the goods, the sale is void as to all persons except innocent purchasers." Taking the instruction all together and construing it in the sense evidently intended, it announced the law correctly.

As the question of the intention of Buck to pay or not to pay for the goods he bought of Gavin & Co. at the time he bought was a question of fact to be determined by the jury from all the facts and circumstances in proof in the case, and this was properly submitted to the jury by the court's instructions, and the jury have found in favor of the appellees, the judgment is affirmed.

BUNN, C. J., did not participate in the decision of this cause.

FRAUDULENT PURCHASERS.—If the purchaser of goods on credit has no reasonable expectation of being able to pay for them, it is equivalent to an intention not to pay: *Talcott v. Henderson*, 31 Ohio St. 162; 27 Am. Rep. 501, and extended note thereto: *Durrell v. Haley*, 1 Paige, 492; 19 Am. Dec. 444, and note. One purchasing goods on credit, knowing his insolvency and inability to pay, is not guilty of such fraud as will avoid the sale if he purchased without the preconceived design of not paying for them: *Bidault v. Wales*, 19 Mo. 36; 59 Am. Dec. 327, and note; *Bidault v. Wales*, 20 Mo. 546; 61 Am. Dec. 205, and note. This question is fully discussed in the extended note to *Thurston v. Blanchard*, 33 Am. Dec. 708.

GAINES v. BARD.

[57 ARKANSAS, 615.]

MASTER AND SERVANT.—THE PAYMENT OR PROMISE OF WAGES IS NOT ESSENTIAL to the existence of the relation of master and servant.

MASTER AND SERVANT, WHO OCCUPY RELATION OF.—The attendants at a bath-house, if selected and subject to be discharged by the owner, and performing services for him in keeping the bathrooms and the adjacent halls clean, comfortable, and properly heated, are his servants, for whose conduct or negligence he is answerable to his patrons, though they, and not he, pay such attendants all the compensation they receive, and the attendants when performing services for patrons are under their immediate control.

ACTION to recover for injuries received by plaintiff while taking a vapor bath in defendant's bath-house from the negligence of an attendant. Persons visiting the defendant's bath-house generally consulted a physician respecting the baths to be taken. They purchased tickets of the manager of the house, paying therefor a sum which included the price of the baths and a fee for an attendant therein, if an attendant was desired; otherwise they paid for the price of their baths and were left without any attendants. The attendants were selected by the proprietor or his manager, and he exercised the power of discharging them at will, and also of assigning them to persons applying for attendance. Their compensation, however, was wholly paid in fees received from patrons on whom they waited, and while the patron was bathing the attendant was under his special control and direction. Under these circumstances the defendant in this action claimed that the attendant, by whose negligence the injury was suffered, was not a servant of the defendant, but of the plaintiff himself, and, therefore, that the defendant could not be liable, even though there had been negligence on the part of the attendant and consequent injury to the plaintiff. Judgment for the plaintiff, defendant appealed.

G. G. Latta, and Martin and Murphy, for the appellants.

Wood and Henderson, for the appellees.

622 **MANSFIELD, J.** 1. The exception reserved to the refusal of the court to give to the jury the first instruction requested by the defendants, and the exception taken to the rejection of their fourth prayer, raise in effect the same question; and the point made upon both of these exceptions is that if the attendant, John Martin, acted under the plaintiff's

direction or control while administering the baths he was the servant of the plaintiff, and the defendants are not therefore liable for his alleged negligence. But we think the conclusion thus insisted upon is not, in a legal sense, deducible from the facts stated in the two instructions referred to, when those facts are considered in the light of all the other circumstances of the case.

Martin was one of several persons connected with the defendants' bath-house in the capacity of attendants upon persons who desired their assistance in taking baths. These attendants were selected by the manager of the bath-house, and during the period of their service enjoyed the exclusive privilege of administering baths and of receiving the fees allowed therefor. In consideration of this privilege, they not only attended at the bath-house for the purpose of performing their duties in assisting bathers, but kept the bathrooms clean and made the halls between the rooms comfortable by keeping them ⁶²⁴ properly heated. It resulted, from the nature of their employment and from the supervision essential to the usefulness of the bath-house, that the attendants should be subject to the general control of the manager and to dismissal by him for any sufficient cause. The manager had power to assign either of them to the service of any visitor who had not selected an attendant for himself, and they could earn no fees otherwise than by using the rooms and other bathing appliances belonging to the defendants. Their labors were all in furtherance of the business enterprise in which the defendants were engaged; and it was entirely inconsistent with the interests of the latter, and with the duty they owed to the public as lessees and proprietors of the bath-house, that attendants upon bathers should be allowed to pursue their calling as independent contractors, or as persons conducting a business not subordinate to the business of the defendants. This being so, we think the position of the attendants was such that the law, in affording a remedy to third persons for their negligence, will regard them as the servants of the defendants, whether they served under an actual contract with the defendants or not: Cooley on Torts, 623; Wood's Master and Servant, sec. 304.

But we think they acted under a contract with the defendants; and it is not speaking accurately to say that the administration of baths was the only service they rendered for the fees they received. The fees were paid to them by per-

mission of the defendants, and were accepted as compensating them for all their labors at the bath-house, including their services in keeping the rooms and halls in a cleanly and comfortable condition. That they received no compensation except as it came to them in fees paid by the bathers they were selected or assigned to wait upon, and that bathers had the privilege of selecting their own attendants and paying the ⁶²⁵ fees directly to them, are facts which go to show that the amount of the fees to be paid each attendant was uncertain and contingent; but such facts are entirely consistent with the proposition that the right to earn any fees at all grew out of a contract with the defendants. Martin's position, then, was similar to that of a servant at a hotel, to which reference is made by way of illustration in the case of *Laugher v. Pointer*, 5 Barn. & C. 579.

In that case it was held that where the owner of a carriage hired a pair of horses of a stable-keeper to draw it, and the stable-keeper provided a driver, the owner of the carriage was not liable for an injury to a third person caused by the driver's negligence. "This coachman," said the court, "was not hired to the defendant; he had no power to dismiss him. He paid him no wages. The man was only to drive the horses of the jobman. It is true the master paid him no wages, and the whole which he got was from the person who hired the horses, but that was only a gratuity. It is the case with servants at inns and hotels. Where there is a great deal of business they frequently receive no wages from the owner of the inn or hotel, and trust entirely to what they receive from the persons who resort to the inn or hotel, and yet they are not the less the servants of the innkeeper": See, also, *Quarman v. Burnett*, 6 Mees. & W. *499. This ruling, it will be noticed, does not make the payment or promise of wages a test of the existence of the relation of master and servant; nor do any of the authorities make the payment or expectation of compensation essential to the creation of that relation as to third persons. "The real test" as to such persons, says Mr. Wood, "is whether the act (causing an injury) is done by one or another . . . with the knowledge of the person sought to be charged as master, or with his assent, express or implied": Wood's Master and Servant, secs. ⁶²⁶ 7, 304, 306; *Mound City Paint etc. Co. v. Conlon*, 92 Mo. 221; *Kimball v. Cushman*, 103 Mass. 194; 4 Am. Rep. 528; *Heygood v. State*, 59 Ala. 51.

There are many cases, of such familiar occurrence that it is

needless to mention them, in which the duty of a servant to his master can only be performed by acts done according to the direction of a third person whose convenience, taste, or physical condition determines the time and manner of doing them. If Martin had served for daily wages paid directly by the defendants, it would still have been his duty to them to administer baths to the plaintiff according to the directions of the latter, who was guided in his wishes by the advice of his physician. And in such case the plaintiff would not have had less power to discharge Martin as an attendant at the bath-house or to regulate his general conduct there than he had in the present case. In either case he could, for good cause, have refused the attendance of Martin, but he could not, without the consent of the defendants, have engaged the services of one whom they had not authorized to act as a regular attendant. Such being our view of the relation established between the parties by facts not in dispute, we think the court did not err in refusing to give the defendants' first and fourth instructions.

2. The defendants' third request to charge was in substance that although Martin was their servant, if the plaintiff gave him permission to leave him after his legs were placed in the vapor bath, and in consequence thereof he received the injury of which he complains, he is not entitled to recover. The court added to this a clause to the effect that in the case stated by the instruction the defendants would not be liable unless Martin was guilty of negligence in failing to respond promptly to the plaintiff's call for assistance. The modification was proved for the reason that there was testimony tending to show that the plaintiff consented to Martin's absence on condition ⁶²⁷ that he would return promptly on being called, and that his failure to do so caused or aggravated the injury.

3. But the court's third, fourth, and fifth instructions were not applicable to the only facts constituting a cause of action which the evidence tended to prove. The plaintiff's leg was injured either in the vapor-box or in a bathtub in which he placed it after he left the vapor bath. If the injury was received in the tub, there is no contention that it was due to the negligence of Martin or any other attendant. If it was received at the vapor-box through the want of proper attendance, or because the defendants were guilty of negligence in the construction of the box, or in failing to see that it was in a safe condition at the time the plaintiff used it, they were

liable for the injury. The injury was peculiar in its effect upon the leg, and although the plaintiff testified that it was a burn, and was received in the vapor-box, he was unable to state the immediate cause of it. Whatever may have been the cause, the evidence did not warrant a finding that there was any neglect in fixing the temperature of the vapor bath, for it shows that the temperature of that bath could not be controlled by the attendants, and was uniform except as it was affected by the weather. The third, fourth, and fifth instructions were therefore abstract and misleading, for each of them applies only to a case of neglect in preparing a bath the temperature of which was made too high. For this error in the court's charge, the judgment must be reversed, and the cause remanded for a new trial.

MASTER AND SERVANT—THE RELATION, AND HOW CONSTITUTED.—This question will be found thoroughly discussed in the monographic notes to *Brown v. Smith*, 22 Am. St. Rep. 459-463, and *Governor v. Withers*, 50 Am. Dec. 105.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

MONTGOMERY v. SAYRE.

[100 CALIFORNIA, 182.]

PRINCIPAL AND SURETY.—If a promissory note is executed by one person to secure the payment of another promissory note made by another person, the maker of the first note is in legal effect a surety of the maker of the second, and is relieved from liability by a release of a judgment recovered on the second note, or by the failure of the judgment creditor to enforce such judgment and his selling or joining in the sale of the land upon which it was a lien for less than its real value, when by taking out an execution on his judgment and selling the land at its real value he would have realized sufficient to have paid the second note, and thereby have rendered any resort to the surety unnecessary.

EVIDENCE OF THE VALUE OF LAND.—When the question is whether a principal, by uniting in a conveyance and sale of land instead of selling it under execution, has thereby injured a surety of the debt for which the judgment was entered, the question to be submitted to the jury is not, what is the cash value of the land if sold by the sheriff at public auction, but what is its fair market value at the time of the sale thereof?

EVIDENCE OF THE VALUE OF LAND IS NOT NECESSARILY CONFINED TO THE VERY DAY on which it was sold, but may include other periods before and after such sale.

W. F. Goad and Arthur Rodgers, for the appellant.

George A. Nourse, for the respondent.

183 **McFARLAND, J.** This is an appeal by plaintiff from a judgment in favor of defendant, and from an order denying a motion for a new trial. The main history of the case is stated in the opinion of this court upon a former appeal (*Montgomery v. Sayre*, 91 Cal. 206); and it need not be repeated here.

The first question in the case is whether or not Sayre, deceased, made the ten thousand dollar promissory note to ap-

pellant sued on as surety for W. S. Chapman. Respondent contends that this question was decided affirmatively by this court on the former appeal, and that such decision is the law of the case. This court did say in its opinion on that appeal that "Sayre was, in law, a surety"; but we will not inquire into the somewhat complicated question whether that statement was necessary to the determination of that appeal, and therefore the law of the case; because we think that the correctness of that statement otherwise appears. Indeed it appears from the complaint itself, which includes the presentation of the claim to the executor.

It is not pretended in the complaint that the Sayre note for ten thousand dollars was not given as security in some form, or that an action could be maintained upon it as on any ordinary promissory note, without averring extrinsic facts other than those appearing upon its face. The complaint avers that on April 19, 1884, the Pioneer Mining Company, a corporation, made and delivered to appellant (Montgomery) its promissory note for one hundred and ten thousand dollars, and "that said note was indorsed by Wm. S. Chapman." (The evidence shows that the indorsement was preceded by the words: "Demand, notice, and protest waived April 19, 1884.") It is then averred: "That at the time of said delivery of said note, and to secure the ¹⁸⁴ payment of the same, there was delivered to plaintiff by way of pledge all the capital stock of said corporation except thirty shares thereof, and said corporation did execute to plaintiff its mortgage on the Pioneer mine in Sierra county, in said state, and said A. L. Sayre, now deceased, who was then living, did make, execute, and deliver his promissory note, hereafter designated as the 'Sayre note,' bearing even date herewith, for the sum of ten thousand dollars (\$10,000"), the same being the note here sued on. It is then further averred that several payments were made from time to time on said note for one hundred and ten thousand dollars; that afterwards plaintiff foreclosed said mortgage on the Pioneer mine; that the proceeds of the sale of the mine under said foreclosure was applied to the payment of said note, but was not sufficient to satisfy it; that a deficiency judgment was entered and docketed against said corporation and against said Chapman for sixty-one thousand five hundred and fifty-four dollars and thirteen cents; that thereafter certain payments were made on said note and judgment; and that there remains due and unpaid on said note and judgment

the sum of thirty-four thousand five hundred and fifty-one dollars and twenty cents. It is further averred that said corporation has no other property, and that its capital stock is valueless; and upon these averments plaintiff bases his right to recover the amount of the Sayre note.

From the foregoing averments it seems quite clear to us that Sayre was a surety for Chapman—for Chapman as well as for the mining company. It appears that on April 19, 1884, there was made and delivered to appellant a promissory note for one hundred and ten thousand dollars, signed at the bottom by the Pioneer company, and indorsed by Chapman, and that "to secure the payment of the same" Sayre, deceased, made the "Sayre note" for ten thousand dollars. It was to secure the one hundred and ten thousand dollars just as it stood—with the names of the responsible parties ¹⁸⁸⁵ thereto, the maker and indorser written therein and thereon—that Sayre made his note. The only liability which he assumed to appellant was that if the persons who signed said one hundred and ten thousand dollar note, the one in form as maker, and the other as indorser, with demand and notice waived, should fail to pay the same, he (Sayre) would be liable for the same to the extent of his ten thousand dollar note. He based his contingent liability upon the probable financial ability of both the mining company and Chapman; as to him they were both principals, and he was exonerated, if by any act of appellant the latter's rights or remedies against either the mining company or Chapman were impaired, suspended, or destroyed. And this conclusion is made still more apparent by the fact that the one hundred and ten thousand dollar note was merged in a deficiency judgment against both the mining company and Chapman.

Sayre, then, being a surety, he was exonerated: 1. If appellant Montgomery released Chapman from all liability under said judgment, and thus released the surety; or 2. If Montgomery, having a judgment lien upon land of Chapman which, if sold at its real value, would have realized a sufficient amount of money to satisfy all indebtedness of the latter to the former, including said judgment, united with Chapman in selling and conveying said land at private sale to one Hughes for a price far less than its real value.

The jury returned a general verdict for defendant, no special issues having been submitted to them; and it is quite clear that they were warranted by the evidence in finding the

first of the said two propositions in favor of respondent—that is, that Montgomery released Chapman.

And there is no specification of the insufficiency of the evidence to support such a finding, or of any erroneous ruling of the court as to the admissibility of evidence on that point. Respondent contends that the general verdict imports a finding in his favor of all the material issues, and therefore a finding that appellant ¹⁸⁶ released Chapman; and that this being so it is immaterial whether or not the court committed any error with respect to the second question as to the value of the land sold to Hughes. Appellant contends, however, that it cannot be known upon what ground the jury based their verdict, and therefore if the court committed errors about the question of the value of the land, the judgment should be reversed. We will assume, for the purpose of this decision, that appellant's view of the matter is correct, because we do not think that the court committed any reversible error in its rulings concerning the value of the land.

With respect to the question of the value of the land, appellant took a number of exceptions to the rulings of the court in passing upon offered evidence and instructing the jury on that subject. The various exceptions, however, present mainly one point, which may be stated as follows: Appellant contended that the only question proper to be asked witnesses on the subject of value was, what would the land have brought if respondent had taken out an execution and had it sold by the sheriff at public auction for full cash value? While the court admitted evidence that in the region of the land in question large tracts of land had never been sold for all cash, but for from one-fourth to one-third cash, and the balance on reasonable time and at a reasonable rate of interest secured by mortgage on the land sold, and allowed witnesses to be asked the general question: "What was the fair market value of the land at the time of the sale to Hughes?" In this ruling the court, in our opinion, did not commit error. The appellant declined to pursue his lien against the land, and sold it at private sale; and having done so, the question before the jury was the difference between the amount for which it was sold, and its fair market value at the time of sale. And in arriving at the real value of the land, the jury were not confined in this case, any more than they would have been in any other case, to what it would have brought at a forced sale for cash. They had ¹⁸⁷ the right to consider the char-

acter and situation of the property, and the usual methods by which sales of such property were affected, where there were parties wanting to sell, and parties wanting to buy. Indeed, it would have been practically impossible to have determined the market value of such land upon the supposition of full cash payment, for there had been no such sales. It was proper, therefore, for the jury to have such information as the said ruling of the court allowed them. The testimony admitted tended to show the fair market value of the land, and furnished proper aid to the jury in determining such value. The case of *Cassin v. Marshall*, 18 Cal. 689, cited by appellant, dealt with facts very different from those in the case at bar. It is to be remarked also, that the sale from appellant to Hughes was for a very small amount in cash, and the balance on time secured by mortgage.

It is also contended that the court erred in allowing some testimony of the amounts for which Hughes sold some small parts of the land "a few months" after the sale to him. This, considering the other evidence in the case, would be a matter of too small importance to work a reversal of the judgment, even if it be conceded that the ruling was erroneous. But we do not think that the ruling was erroneous. While the thing to be determined is the value on the day in question, still, evidence is not necessarily confined to that very day. Evidence of value for short periods before and after the day in question has been frequently allowed. Its allowance is greatly within the discretion of the court, and, under the circumstances of this case, we do not think that such discretion was abused.

The judgment and order appealed from are affirmed.

DE HAVEN, J., FITZGERALD, J., GAROUTTE, J., and HARRISON, J., concurred.

Rehearing denied.

EVIDENCE OF THE VALUE OF LAND.—This question is discussed in *Elmore v. Johnson*, 143 Ill. 513; 36 Am. St. Rep. 401; *Laing v. United New Jersey R. R. etc. Co.*, 54 N. J. L. 576; 33 Am. St. Rep. 682, and note; *Jones v. Erie etc. R. R. Co.*, 151 Pa. St. 30; 31 Am. St. Rep. 722, and note, and *Gallagher v. Kemmerer*, 144 Pa. St. 509; 27 Am. St. Rep. 673, and note.

SURETYSHIP—RELEASE OF SURETY.—A failure of a creditor to revive a judgment does not release a surety in the absence of an agreement that such judgment should be kept revived for his benefit: *Campbell v. Sherman*, 151 Pa. St. 70; 31 Am. St. Rep. 735, and note with the cases collected. See the extended notes to *Thorn v. Pinkham*, 30 Am. St. Rep. 339, and *Scott & Fisher*, 28 Am. St. Rep. 691.

PEOPLE v. BAKER.

[100 CALIFORNIA, 188.]

CRIMINAL LAW.—AN INFORMATION CHARGING AN OFFENSE is not materially defective because it does not contain the word "information" in the body of the pleading, if such word is used in the heading, and the facts specifically alleged constitute the crime sought to be charged.

CRIMINAL LAW—VENUE, STATEMENT OF.—An information having in the body thereof the words "county of Los Angeles, state of California," and charging the commission of a crime "at the county and state aforesaid," sufficiently avers the place of such commission.

FORGERY.—A MORTGAGE OF A HOMESTEAD MAY BE A FORGERY and punishable as such, though it purports to be executed by the husband alone, and would therefore be inoperative, even if genuine, if such mortgage was forged with intent to defraud a person named in the information.

FORGERY.—A SUFFICIENT UTTERING OF A FORGED MORTGAGE is shown by evidence tending to prove that it was placed upon record by a person other than the mortgagee, though never delivered to the latter, if the object of placing it upon record was to obtain a loan from him and to otherwise defraud him.

FORGERY—INDICTMENT—VARIANCE.—THE FACT THAT A MORTGAGE ALLEGED to have been forged does not, as set out in the indictment, contain a copy of the certificate of acknowledgment affixed thereto, does not establish a fatal variance.

FORGERY—EVIDENCE.—If a mortgage alleged to have been forged is set out in the indictment, and contains a copy of the note to be secured thereby, it is not error to admit evidence of the signing of the note, as well as the mortgage by the accused.

JURY TRIAL.—THOUGH A COMMENT BY THE COURT DURING THE TRIAL OF A CRIMINAL CAUSE respecting the mode in which the attorney for the accused conducts his examination may be unnecessarily harsh, yet the judgment of conviction will not be reversed on that ground, if from the whole case it does not appear that the accused was injured thereby.

J. G. Peck and S. M. White, for the appellant.

Attorney General W. H. H. Hart, for the respondent.

189 **McFARLAND, J.** The defendant was charged with and convicted of the crime of forgery, and appeals from the judgment and also from an order denying a motion for a new trial.

The appellant makes a great many points in his briefs, and elaborately argues them; and we will notice briefly what we consider the most important of such points.

1. Appellant contends that the information is fatally defective, because the word "information" is not used in the body of that pleading. The word "information" appears as a heading of the pleading, and the body of the pleading commences as follows: "The said Edward L. Baker is accused

by the district attorney," etc. But, as the pleading alleges all the facts necessary to constitute the crime sought to be charged, it is not defective merely because the word "information" is not used in the body of the instrument. The variation from the usual form was, we presume, the effect of oversight, or, perhaps, of an unexplainable desire to take a new departure; but this variation is not sufficiently material to make the pleading invalid.

We think, also, that the averment of venue is sufficient; the words "county of Los Angeles, state of California," having been used in the first part of the information, it was sufficient afterwards to allege that the crime was committed "at the county and state aforesaid."

2. The alleged forgery was of a certain mortgage, purporting to have been signed by one Morris M. Green; and it is contended by appellant that because said Green was a married man, and there was a homestead declaration on the property covered by the mortgage, therefore no forgery in law could be committed by signing the name of Green alone to the instrument. But if the instrument was falsely made in the name of Green, with intent, as is alleged in the information, to defraud the said Morris M. Green and one Strassforth, from whom the money was to be borrowed on the mortgage, ¹⁹⁰ the act was forgery, whether or not, as a matter of law, the mortgage would have been good without the execution of it by both husband and wife.

The mortgage was placed on record in the recorder's office by the appellant, or by one Hoy, who was the principal in the alleged crime, because Strassforth, who was to loan the money on the mortgage, desired it to be placed on record before he examined the title; and we think that, under the circumstances, this was a sufficient uttering of the alleged forged instrument, although it was not in any other way delivered to Strassforth, who about that time began to suspect the fraud.

3. The mortgage introduced in evidence had attached to it a certificate of acknowledgment, while the copy of the mortgage set forth in the information did not have such certificate. We do not think that this was a fatal variance.

4. The mortgage as set forth in the information contained a copy of a promissory note which it was given to secure; and we do not think that the court erred in allowing proof of the signing of the note as well as the mortgage. They were both

parts of the same transaction, and one was preliminary to the other.

5. We have examined the instructions given to the jury by the court and those asked by defendant, and refused, and we do not see any errors committed by the court in the matter of instructing the jury. Of the instructions asked by the defendant, and refused, those which were correct were given in other parts of the charge.

6. There are a great many exceptions in the record to the rulings of the court upon the admissibility of evidence; but we see no material error committed by the court in such rulings.

7. The most serious point made by appellant is, that during the progress of the trial the court unnecessarily and unjustly censured the attorney of appellant, and applied to his conduct of the case improper adverse criticism, and thus prejudiced the jury against the attorney, ¹⁹¹ and therefore against appellant. This contention has certainly some plausible reasons for its support; but, after a full consideration of the whole matter, we do not think that what passed from the court to appellant's counsel was of sufficient impropriety or importance to warrant us in setting aside the verdict.

The great difficulty with an appellate court in determining such a question is to learn from a dry, printed transcript the true character and quality of the thing complained of. It is not photographed before us; and we cannot know the tone, the emphasis, the expression, the manner with which the thing was said or done. The language complained of related mainly to what the court considered an unnecessary consumption of time by appellant's counsel in examining and cross-examining witnesses, making objections, etc. The court no doubt might have confined counsel within proper limits of time in conducting the defense by the use of less harsh language; but that nice mingling of the *fortiter in re* and the *suaviter in modo*, which would enable a presiding judge to always keep in hand the orderly conduct of a trial without an occasional jerk, is not to be often expected. Counsel for appellant seems to have been entirely respectful in his manner to the court; but his repetition of questions, many of which were pointless, was a useless waste of time. Some of the witnesses for the people had been examined on a previous trial of another person for the same offense, and upon a preliminary examination before a magistrate; and counsel for ap-

pellant asked them a great many questions about what they had testified on those former occasions. This was proper, of course, if there had been an apparent intent to show a difference between their former and their present testimony; but most of the questions were whether or not they had said things on the former occasions which were exactly the same things to which they had just then presently testified. All this was no doubt trying to the patience of the court; and while some of the language used by the court to counsel is not ¹⁹² at all to be commended, we do not think that, considering the whole case, the appellant was prejudiced or injured thereby.

There are no other points necessary to be considered.

The judgment and order appealed from are affirmed.

GAROUTTE, J., PATERSON, J., HARRISON, J., FITZGERALD, J., and DE HAVEN, J., concurred.

Rehearing denied.

INDICTMENT.—ALLEGATION OF TIME AND PLACE: *Palmer v. People*, 138 Ill. 356; 32 Am. St. Rep. 146.

FORGERY—INTENT.—The essential element of forgery consists in the intent: *State v. Wheeler*, 20 Or. 192; 23 Am. St. Rep. 119, and note. So where the forged paper is such that it might, from its nature and the course of business deceive or mislead to the prejudice of another person the crime is complete: *State v. Cross*, 101 N. C. 770; 9 Am. St. Rep. 53, and note. The question is fully discussed in the extended notes to *Hendricks v. State*, 8 Am. St. Rep. 466, and *Arnold v. Cost*, 8 Am. Dec. 306, and in *People v. Munroe*, 100 Cal. 664, *post*, 323, and note.

MITCHELL v. DONOHUE.

[100 CALIFORNIA, 202.]

WILLS—OLOGRAPHIC—WHAT SUFFICIENT.—The words: "Crolldepdro, february 3, 1892. this is to serifey that is levet to mey wife Real and personal and she to dispose for them as she wiz," constitute a good olographic will, and should be read as follows: "Corral de Piedra, February 3, 1892. This is to certify that I leave to my wife [my] real and personal [property], and she to dispose of them as she wishes."

WILLS—CONSTRUCTION.—Courts, in reading wills, always supply obviously omitted words whenever the word omitted is apparent, and no other word will supply the defect.

William Shipsey, for the appellants.

Wilcoxon and Bouldin, and *J. M. Wilcoxon*, for the respondent.

205 The COURT. For the reasons given in the opinion filed by this department June 27, 1893, the judgment and orders appealed from are affirmed.

The following is the opinion above referred to:

BELCHER, C. Patrick Donohue died in San Luis Obispo county on the nineteenth day of February, 1892, leaving surviving his wife, the respondent, Kate Donohue, but no children, and also leaving an estate, consisting of real and personal property of the value of about fifteen thousand dollars. His heirs at law, other than his widow, were one sister and several nephews and nieces, children of two deceased brothers. In due time the widow filed in the superior court of San Luis Obispo county her petition in proper form, asking that a paper accompanying the petition be admitted to probate as the last will of her deceased husband. The accompanying paper, as is shown by a photographic copy thereof brought here in the record, reads as follows:

“CROLLDEPDRO, february 3, 1892.

“this is to serifey that ie levet to mey wife Real and personal and she to dispose for them as she wis.

“PATRICK DONOHUE.”

A day was set for hearing the petition, and on that day the sister and one nephew and four nieces of the decedent appeared and filed written grounds of opposition to the probate of the alleged will. The grounds stated were as follows:

1. “Said instrument is not a will, nor is it the last will or testament of said Patrick Donohue, deceased.

206 2. “Said instrument was not written by said Patrick Donohue freely or voluntarily, or at all.

3. “At the time of the execution of said instrument said Patrick Donohue, in executing the same, was under duress, menace, fraud, and undue influence, and he was not then competent to make a last will and testament; at the time of the execution of said instrument, and for some time prior thereto, said Patrick Donohue was at his home at Corral de Piedra, in the above-named county, and was sick, and in great pain and suffering of body and mind; that his wife, Mrs. Kate Donohue, who now petitions to have said instrument admitted to probate as a will, constantly and repeatedly importuned, harassed, and annoyed said Patrick Donohue, deceased, concerning his and her property and the disposition thereof, and gave him no rest, peace, or quiet upon the subject, and re-

peatedly urged him to transfer such property to her by deed or will; that in order to put a stop to such importunities, and thereby obtain for himself some peace, said Patrick Donohue, being by his said wife thereto coerced and unduly influenced as aforesaid, did sign the aforesaid instrument, but, not intending the same as or for his last will or testament, and the same is not his testament or will."

The petitioner served and filed her answer to the opposition, fully controverting thereby all the facts alleged by the contestants.

The case was thereafter tried before a jury, and the following special issues were framed and submitted to them for decision:

1. Is the document presented for probate the last will of Patrick Donohue, deceased?

2. Was said document entirely written, dated, and signed by the hand of Patrick Donohue himself?

3. If said document was written and signed by said Donohue, was it written and signed freely and voluntarily?

4. If said document was written and signed by said Donohue, was the same executed by him under duress?

207 5. If said document was written and signed by said Donohue, was the same executed by him through menace?

6. If said document was written and signed by said Donohue, was the same executed by him through fraud?

7. If said document was written and signed by said Donohue, was the same executed by him through undue influence?

8. Was said document executed by said Donohue as and for his last will?

9. Did Patrick Donohue intend this paper as his last will and testament?

10. Is this paper the last will and testament of said Patrick Donohue?

To the first, second, third, eighth, ninth, and tenth questions thus submitted, the jurors, by their verdict, answered, yes; and to the fourth, fifth, sixth, and seventh questions they answered no.

The court adopted the findings of the jury, and in accordance therewith further found that the said document "is the last will and testament of Patrick Donohue, deceased; that it was executed in all particulars as required by law, and that said testator, at the time of the execution of the same, was of sound and disposing mind, and not acting under undue influ-

ence, menace, fraud, or duress." And thereupon an order was made and entered admitting the proposed will to probate, and appointing the petitioner administratrix of the estate of the decedent, with the will annexed.

From this order, and an order denying their motion for a new trial, the contestants appeal.

"An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed": Civ. Code, sec. 1277. And such a will may be proved in the same manner that other private writings are proved: Code Civ. Proc., sec. 1309.

A will may be informally drawn, and may consist of ~~two~~ one or more papers. No particular words are necessary to show a testamentary intent. It must appear only that the maker intended by it to dispose of property after his death, and parol evidence as to the attending circumstances is admissible. And courts, in reading wills, always supply obviously omitted words, wherever the word omitted is apparent, and no other word will supply the defect: *Estate of Wood*, 36 Cal. 75; *Clarke v. Ransom*, 50 Cal. 595; *Estate of Skerrett*, 67 Cal. 585; 6 Lawson's Rights, Remedies, and Practice, sec. 3140; Redfield on Wills, pt. 1, p. 454.

Counsel for respondent contend that the document in question here was intended by decedent as a testamentary disposition of his property, and that it was sufficient in form to meet the requirements of the law, and to justify its admission to probate as a will. As they read the paper, it is as follows:

"CORRAL DE PIEDRA, February 3, 1892.

"This is to certify that I leave to my wife [my] real and personal [property], and she to dispose of them as she wishes.

"PATRICK DONOHUE."

Counsel for appellants, on the other hand, contend that the document was not entitled to probate as a will, because it is vague and uncertain as to the subject matter, presenting a case of patent ambiguity which renders it absolutely void.

This contention is rested upon the theory that it cannot be determined from the face of the paper whether the word "levet" should be read as "leave" or "left," nor what real or personal property is referred to, and therefore that the construction given to the paper by respondent is unauthorized.

We are unable to see any such patent ambiguity in the

language used as would render the paper void on its face. The court below evidently read the word "level" as "leave," and supplied the word "my" before, and "property" after the words "real and personal"; and in our opinion it was justified in doing so. ²⁰⁹ As thus read, the paper shows a testamentary intent which entitled it to probate.

Counsel for appellants also contend that the court below committed numerous errors in the admission and exclusion of evidence.

All of these alleged errors may be considered together, and a brief statement of the facts proved and sought to be proved will be sufficient. •

The decedent and the respondent were married in 1869. They never had any children. Early in 1870 they went to San Luis Obispo county, and thereafter continued to live in that county. At the time of their marriage she had about \$2,200, or \$2,300, in money, but he had no money or property. In May, 1870, they commenced working for wages, he doing farm-work, and she household-work, and continued in such employment until October, 1875, receiving most of the time \$75 dollars per month for their services. About the time they thus commenced working out they loaned to their employers \$1,900 of her money, at one and one-quarter per cent per month interest. This money and their accumulated earnings they subsequently invested in land, which they afterwards sold for about twice the sum it had cost them. In January, 1875, they purchased another tract, a part of the rancho Corral de Piedra, containing 157.79 acres. Both of them were named in the deed as grantees, and the consideration expressed therein was \$8,100. In December, 1877, he conveyed to her 57.79 acres of this tract, and the consideration expressed in his deed was \$2,000. He also at some time gave her a bill of sale of one horse. In 1881, and again in 1888, they purchased a few acres of adjoining land, and the parcels thus purchased in 1875, 1881, and 1888, were owned by them, and constituted their home at the time of his death. Seven or eight years before his death he made a will, but it had been lost or destroyed. By that will he devised all his property to his wife during her life, and after that it was to go to his other heirs. A few days before he wrote the ²¹⁰ paper in controversy he became sick, resulting from an abscess in his back, and he continued to grow worse till he died. His mind, however, was clear and vigorous up to the day of his death. On the morning

of February 8, 1891, he was up and sitting by the dining-room table. He asked his wife for a sheet of paper, and when he obtained it he began to write. As to what then occurred she testified as follows: "So when I saw him writing I took my chair and sat down. It was between eight and nine in the morning. When he got through writing he passed it over to me. He says: 'That's for you, for fear any thing should happen, to protect you from them, because I know they will go for you. I made that will for you to save you. There is nothing there but your own hard earnings. I will tell you what to do with it. Sell it, put it in two banks, or put it in three banks, and sit down and take comfort, and don't be no longer a slave for them. It is no more than right that there should be some person in here to sign that.' There was no man I could call, and Mr. Gaxiola was off with the horses. He says: 'Never mind, take it and put it in your trunk, and put it away, and every one in town knows my signature.'" And again: "When this paper was written there was no one in the house but my husband and me. Nobody saw this paper after it was written and put in my trunk until Monday, February 22d, the day after the burial, and I did not inform a living being that it was in existence."

The contestants sought to prove that Mrs. Donohue became insanely jealous of her husband a dozen years or so before his death, and that she thereafter entertained and often expressed suspicions that he had or would transfer to others, without her knowledge or consent, all the real and personal property which he had conveyed to her, and would also dispose of his own property so that she would get nothing from it, and would be left destitute; that he and others had often told her that he had not conveyed away her property ³¹¹ and could not do so, and that all her suspicions and fears were groundless, but that their efforts in this behalf were futile, and failed to convince her.

The court admitted all of this offered evidence as to what had been said and done by respondent within three or four years before her husband's death, but, on her objection, excluded all of it relating to earlier dates.

Counsel now insist that the paper presented as a will was not intended as such at all, but simply as a certificate that that the writer "left"—that is, transferred—to his wife several years before, certain real and personal property which was still hers and subject to her disposal, and that his only

purpose in making the paper was to allay her suspicions that he had subsequently transferred the same property to others. And it is claimed that the action of the court in excluding the offered evidence was erroneous, because if admitted it would have tended strongly to sustain the appellants' theory as to the true meaning and purpose of the paper.

We fail to see any material error in any of the rulings complained of. The court in allowing the contestants to go over the married life of the parties for three years or more, and to show up their little disputes, bickerings, and dissensions, seems to have been quite as liberal as any rule of law or common justice could require. Besides, as said in another contested will case (*In re Spencer*, 96 Cal. 448): "It is difficult to conceive how the verdict and judgment could have been different if the court had ruled throughout the trial as asked by appellants. And in such a case a judgment will not be reversed even though some errors have occurred during the progress of the trial."

Counsel for appellants further contend that the court erred in striking out and refusing to give to the jury portions of two instructions asked by contestants, and in giving a portion of one of the instructions which it gave of its own motion. The clause stricken out from one of the instructions asked was, in effect, that the proponent of the alleged will must prove by a preponderance ²¹² of evidence that the paper was intended by Patrick Donohue as his will, and that in this connection the jury might consider certain specified testimony. And the clause stricken out of the other instruction was that "as to the paper the rule of law is, that where an instrument is equally susceptible of two interpretations, one in favor of natural rights and the other against it, the interpretation favoring natural rights is to be adopted. By natural rights is meant the rights of the parties under the law if no will was made; and I instruct you that if Patrick Donohue had made no will, the natural rights of his brothers and sisters and of the children of any deceased brother or sister would entitle them to a share of his estate."

There was no prejudicial error in striking out these clauses. The instructions as given plainly told the jury how, in the absence of a will, the estate of decedent would have been succeeded to and distributed, and that in determining whether the paper in question was intended by the decedent as his will, they must take into consideration his mental and

physical condition at the time the paper was written; who his relatives were and the claims which they naturally had upon his bounty; any prior declarations which he may have made going to show his intentions as to the disposition of his property after death; and the circumstance, if it existed, that before the date of the paper he had formed in his mind a settled purpose to dispose of his property in a manner different from what the paper purports to do; and also all of the testimony admitted in evidence and bearing upon the question, including the contents of the paper itself; and that the burden of proving that the paper was intended by the decedent as his will was upon the proponent.

These instructions, with others that followed, presented the contestants' theory as to the case very clearly and fully, and they were therefore, in our opinion, in no way harmed by the action of the court complained of.

In giving the instructions of its own motion the court ²¹³ called attention to each of the special issues submitted, and, among other things, said: "The next question is, 'was said document executed by said Donohue as and for his last will?' The only testimony that the court recalls upon that—although you gentlemen have all the testimony before you—was the testimony of Mrs. Donohue that he wrote it; he wrote it and signed, and he told her it was his will and gave it to her—but of course you are the sole judges of fact, of the evidence, and the credibility of the witnesses. If you believe that evidence, you should answer yes. If you do not you should answer no."

It is objected that this portion of the instruction was erroneous, because it practically withdrew from the consideration of the jury all of the evidence introduced by contestants for the purpose of showing that the paper was not executed as a will. We do not think the instruction was intended to have the effect charged, and in view of the other instructions given it seems impossible that it could have done so. As we read it, it simply calls attention to the only direct evidence as to the making of the paper, and tells the jury if they believe that evidence to be true, they will answer yes, otherwise no. All the evidence was submitted to them, and in view of it they were to determine whether Mrs. Donohue's testimony as to the execution of the paper was true or not.

The above disposes of the whole case, and it follows that the judgment and orders appealed from should be affirmed.

SEARLS, C., and VANCLIEF, C., concurred.

For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

PATERSON, J., HARRISON, J., McFARLAND, J.

OLOGRAPHIC WILLS.—REQUISITES OF: See the note to *Barney v. Hayes*, 28 Am. St. Rep. 498, and the extended note to *Lagrange v. Merle*, 52 Am. Dec. 591-593.

WILLS—CONSTRUCTION—SUPPLYING WORDS.—The court will supply the proper words to effectuate the testator's intention if it is incorrectly expressed: *Covenhoven v. Schuler*, 2 Paige, 122; 21 Am. Dec. 73, and note See, also, the note to *Goode v. Goode*, 66 Am. Dec. 635.

WREN v. WREN

[100 CALIFORNIA, 276.]

HUSBAND AND WIFE—SEPARATE PROPERTY.—A HUSBAND MAY RELINQUISH his right to the earnings of his wife, and if she and he orally agree that any compensation she may earn in nursing and caring for a person whom she is under no legal obligation to nurse and care for shall be hers such agreement is valid and entitles her to sue for the compensation due for such services, as for her separate estate, if a statute of the state authorizes husband and wife to make any contract with each other, or with any other person, respecting property which either might if unmarried. It is not necessary that the person to whom the services were rendered should have had knowledge of the agreement between the husband and wife.

Frank Sullivan, for the appellant.

Mich. Mullany and William Grant, for the respondent.

278 DE HAVEN, J. The plaintiff, who is a married woman, brought this action to recover three hundred dollars from the defendant for personal services as a nurse, alleged to have been rendered by her to him. At the time these services were rendered the plaintiff and her husband were living together, and the defendant was an inmate of their house, but neither the plaintiff nor her husband was under any natural or legal obligation to care for the defendant without charge. In addition to the foregoing facts, it is alleged in the complaint that prior to the rendition of the services mentioned, it was orally agreed between plaintiff and her husband that she should have and receive all **279** moneys earned by her in nursing defendant as her sole and separate property.

The superior court sustained a demurrer to the complaint, and thereupon rendered judgment in favor of defendant.

The sole question to be determined on this appeal is whether the complaint shows that the earnings of plaintiff in nursing defendant became her separate property, or whether such earnings constitute community property, for which her husband alone has the right to sue. The earnings of a wife during marriage, and while living with her husband and in his house, are community property, and, as such, are subject to the management, control, and disposition of the husband; but the husband may relinquish to the wife the right to such earnings, and when he has done so they become the separate property of the wife. This general proposition is not disputed by defendant, but he contends that the agreement alleged in the complaint did not have this effect, because it related to future earnings, something not then in existence and, therefore, not the subject of a verbal gift. We do not, however, regard this agreement as constituting a gift pure and simple in the legal sense of that term. Section 158 of the Civil Code provides that "either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property which either might if unmarried"; and section 159 of the same code provides that a husband and wife may by contract alter their legal relations as to property, and the succeeding section makes the mutual consent of the parties thereto a sufficient consideration for such an agreement. Under these sections there can be no doubt that a husband and wife may agree between themselves without any other consideration than their mutual consent, that money earned by the wife in performing any work or service which does not devolve upon her by reason of the marriage relation shall belong to her as her own, and, when money has been earned by the wife ²⁸⁰ under such an understanding or agreement with the husband it is her separate property, and she may maintain an action to recover the same. An agreement between husband and wife, by which the husband relinquishes all claim to the earnings of the wife, is one which relates to the acquisition of property by the wife, and is an engagement or transaction respecting property, within the meaning of section 158 of the Civil Code above cited.

This same question arose in the case of *Riley v. Mitchell*, 36 Minn. 3. Under section 4 of the General Statutes of that state (1878), husband and wife are given the right to "con-

tract with each other as fully as if the relation of husband and wife did not exist," except in matters concerning real estate, and the supreme court in that case held that an agreement between husband and wife, that the latter might receive the compensation to be earned by her in nursing a boarder in the family gave her the right to such earnings, and the consequent right to maintain an action for the purpose of collecting the same. The court in that case said: "While it may be true that a married woman will not solely, by virtue of the provisions in General Statutes, 1878 (c. 69, sec. 1), be entitled to moneys due from boarders or others earned by her in and about the keeping and management of the family household, there can be no doubt that, under section 4, same chapter, she may become entitled to receive the same by virtue of a contract between herself and her husband. We do not mean by this that they may stipulate for a pecuniary compensation to be paid by one to the other for performing the duties that pertain to the relation, such as caring for and managing the family, and the household of the family, but confine the proposition to services rendered to others, and compensation from others for such services." We think this may be regarded as a correct statement of the right given to husband and wife to contract with each other in relation to the ²⁸¹ earnings of the wife by the sections of our own Civil Code above cited.

It must be conceded that there is language found in the opinion of this court in the case of *Read v. Rahm*, 65 Cal. 343, which seems to sustain the contention of defendant here that the alleged agreement between the plaintiff and her husband was in the nature of a gift, and ineffectual for that purpose, because it related to future earnings. The following is the language contained in that opinion which is relied upon by the defendant: "There can be no doubt that any indebtedness due from Welsh for board for himself and sons was due to the community, nor could the husband make a gift to his wife of his interest in what should be paid by Welsh for such board in future. He could not give that which he had not yet acquired." The question involved in that case related to the effect of a deed made to the wife by the direction of her husband in settlement of an indebtedness due to the community, and the court held that such deed operated as a gift from the husband to the wife. As this was the only question before the court, it is evident that its intention was not particularly

called to the different matter referred to in the above quotation, and what is there said cannot be regarded as an authoritative decision upon the point presented here.

The plaintiff was not required to allege in her complaint that the defendant had notice of the agreement between herself and husband at the time of the rendition of the services mentioned in the complaint. This point was also passed upon in the case of *Riley v. Mitchell*, 36 Minn. 3, and we think was there correctly decided. It was held in that case that, when there is no question of setoff existing in favor of the defendant against the husband at the time of the rendition of the services, it makes no difference whether the defendant was or was not informed at the time that the wife and not the husband was to receive the pay for such services.

Judgment reversed, with directions to the superior ²⁸² court to overrule the demurrer to the complaint. The appeal from the order sustaining the demurrer is dismissed.

PATERSON, J., FITZGERALD, J., GAROUTTE, J., and HARRISON, J., concurred.

HUSBAND AND WIFE—EARNINGS OF WIFE WHEN HER SEPARATE PROPERTY.—The earnings of a married woman made with the consent of her husband are her separate property: *Coughlin v. Ryan*, 43 Mo. 99, 97 Am. Dec. 375, and note; *Mason v. Dunbar*, 43 Mich. 407; 38 Am. Rep. 201, and note. The cases maintaining this proposition will be found collected in the note to *Abbott v. Wetherby*, 36 Am. St. Rep. 182.

ELLEDGE v. NATIONAL CITY AND OTAY RY. Co.

[100 CALIFORNIA, 282.]

MASTER AND SERVANT.—THE DUTIES WHICH AN EMPLOYER OWES to his employees are to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in order, to exercise ordinary care in the selection and retention of competent servants to properly conduct the business in which the servant is employed, and to make such provision for the safety of the employees as will reasonably protect them against the dangers incident to their employment.

MASTER AND SERVANT—DANGEROUS PLACE IN WHICH TO WORK.—If a workman is put to work alongside a cliff or embankment of stone which he believes to be solid and secure, but which the foreman knows to be insecure and dangerous, and injury is suffered by the workman, the master is answerable, because it is his duty to furnish his employees a reasonably safe place in which to work.

MASTER AND SERVANT—VICE-PRINCIPAL.—If a master owes a duty to his servants and deposes the performance of that duty to another serv-

ant, then the latter is the representative of the master who is chargeable with his knowledge, and his negligence in not performing such duty to another employee or servant is the negligence of the master for which he is answerable.

EVIDENCE.—A DECLARATION OF A VICE-PRINCIPAL OR FOREMAN at the time when a cliff falls upon and injures an employee is a part of the *res gestæ* and therefore admissible in an action against his employer by another servant to recover for injuries sustained by such fall.

Luce and McDonald, for the appellant.

Wellborn, Stevens, and Wellborn, for the respondent.

²⁸⁷ **TEMPLE, C.** Plaintiff sues for damages for personal injuries alleged to have been caused by defendant's negligence.

Plaintiff avers that he was employed by defendant as a laborer, and engaged under its direction in loading stone upon a car, and "that the car on which defendant was loading stone, as aforesaid, on said day, was placed by said defendant, and stood during said day, near and alongside, to wit: about ten feet of a rock or cliff or embankment; that said cliff was of stone, and was thought by plaintiff to be solid and secure, and plaintiff, prior to the falling of said cliff as hereinafter described, had no knowledge or intimation that said cliff was insecure, or that the place where he was working was unsafe or dangerous, but that defendant, by the exercise of reasonable care and diligence, could have known that said cliff was insecure and dangerous; and that defendant did well know that said cliff was insecure and dangerous and liable to fall, but withheld all knowledge of such facts from plaintiff.

The answer consists of denials.

A verdict for the plaintiff was rendered for three thousand dollars damages. The appeal is from the judgment and from an order refusing a new trial.

The defendant is a corporation operating a line of railroad in San Diego, and plaintiff was a section-hand in the employ of defendant, engaged in loading rock from a bank or cliff on one of defendant's cars for use in the repair of the roadbed. The car stood from eight ²⁸⁸ to ten feet from a bank nearly vertical from ten to sixteen feet high, formed by a cut made in the construction of the road. The work had been progressing at that point for three or four days at least. How long does not appear. The work was done under the direction of Jerry O'Connell, roadmaster, who had authority to employ and discharge men, and did employ the plaintiff.

The plaintiff had on previous occasions been in the employ of defendant, but had never previously been employed in blasting rock. On the last employment he commenced work about seven o'clock in the morning of the day on which he was injured. When he reached the place he found no foreman there, but he and a fellow-workman finding drills, put three blasts in the bank about ten feet from the cliff, which afterwards fell to his injury. About three hours after the last blast, while plaintiff and others were loading a car under the immediate direction of O'Connell, some rocks and earth slid down, injuring plaintiff. At the trial defendant introduced no evidence, and in its motion for a new trial and on this appeal contends:

1. That the injury was caused solely by mischance and accident, or by the negligence of plaintiff and his fellow-servants.

2. There is no evidence showing negligence on the part of the defendant.

Respondent contends that the injury occurred because a safe place was not provided in which he could perform his service. It is charged "that plaintiff, without any fault or negligence on his part, but owing entirely and solely to the gross carelessness and negligence of the defendant in requiring and allowing plaintiff to work in said dangerous place, and in failing to warn and notify plaintiff that the place was dangerous and that said cliff was loose, insecure, and dangerous, was injured as above set out."

The liability of the defendant is therefore based entirely upon the charge that it failed to furnish a safe ~~289~~ place in which to work, but, on the contrary, set him to work at an unsafe place, knowing its insecurity, while plaintiff was wholly ignorant of its dangerous character.

In the case of *Daves v. Southern Pacific Co.*, 98 Cal. 19, 35 Am. St. Rep. 133, the law upon this vexed subject was fully considered.

In that case Bresnahan, the section foreman, had full authority to employ and discharge men, and they were entirely subject to his orders during their employment. One morning they had started out upon a handcar to the place where they were to be employed. A train being due, they turned upon a sidetrack to avoid it. Bresnahan carried the key to the switch, and himself unlocked it and turned it. He then directed the deceased to examine the handcar to see what

repairs were needed upon it. Daves stooped down under the car to do so and the incoming train ran upon the sidetrack through the carelessness of Bresnahan in leaving the switch open, and Daves was crushed. It was held that the fact that Bresnahan had authority to employ and discharge the men, with full control over them in performing their work, was immaterial; that an employer owes certain duties to his employees, which he cannot avoid responsibility for by delegating to another; that whoever is authorized and required to perform this duty for the master represents the master as to the performance of that duty and no further. Grade of employment is of no consequence. The question is: "Was, then, the act or omission which caused the injury a personal duty which the defendant corporation owed to the deceased while he was engaged in the performance of his duties as its employee? If it was, and the deceased was not at fault, then the defendant corporation is liable, otherwise not."

The duties which an employer owes to his employees are said to be: "To furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary ^{and} care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed, and to make such provisions for the safety of the employees as will reasonably protect them against the dangers incident to their employment."

It was held that the corporate defendant in that case was not liable, because the place was "of itself, in the first instance, a reasonably safe one," and was made unsafe solely through the negligence of Bresnahan in leaving the switch turned upon the sidetrack, when he ought to have turned it back to the main track; that in this act Bresnahan, though having entire control of the workmen and the switch, did not represent the corporation, but was merely a fellow-workman with Daves. He did not represent the employer, because the corporation had discharged its duty in providing a safe place in which to do the work, and was not responsible if the place was rendered unsafe by the negligence of the fellow-workmen of Daves.

In the case at hand it appears that the plaintiff had been engaged in excavating where the accident occurred for several days; that there was a seam or crack, as some of the witnesses call it, behind the part of the bank that slid off, conspicuous

from the rear, but not visible from the front; that O'Connell, who certainly represented the defendant for the purpose of performing whatever duty it owed to its employees, knew all about it. On the Saturday previous to the accident his attention was called to it, and when the car was placed in position O'Connell again noticed it, and one of the men said: "She still hangs," and O'Connell replied, "Yes, it is liable to stay there until about the first rains," and the workman replied: "Yes, and liable to come down at any time, too." Plaintiff was then called from another point, and set to work filling the car, soon after which the accident occurred. When O'Connell saw what had happened, he said to a workman: "My God! I expected ²⁰¹ that; run and help McCann." McCann and plaintiff were each partly buried in the debris.

Plaintiff had been in defendant's employ for about five hours before the accident. He had not been warned as to the dangerous condition of the cliff, and knew nothing of it. The crack was not visible from the front where he was at work.

Here it is evident the employer had not performed the duty it owed to the servant. He was set to work in a place known, or which the employer ought to have known, was unsafe. He was not informed of the danger. Under the rule laid down in *Daves v. Southern Pacific Co.*, 98 Cal. 19, 35 Am. St. Rep. 133, the defendant is liable.

It is further argued that O'Connell's knowledge of the insecurity was but the knowledge of a fellow-laborer, and cannot be imputed to the defendant. The defendant not being a sentient being, knowledge can only be imputed to it when some agent is chargeable with it. The evidence leaves no doubt upon the proposition that O'Connell was the agent who was required to perform whatever duty defendant owed to its employees.

"If the act was one which it was the duty of the employer to perform towards its servants, and one of them negligently performed it to the injury of another servant in the same common employment, then the offending servant in the performance of such duty acted as the representative or agent of his employer, for which the employer is responsible": *Daves v. Southern Pacific Co.*, 98 Cal. 19; 35 Am. St. Rep. 133.

The danger upon any proper examination was "conspicuous," though the evidence was not visible where plaintiff was at work. Defendant must be held to have known of it.

Appellant also alleges some errors of law at the trial.

1. He contends that it was error to permit the witness to state, against his objection, the exclamation of O'Connell when the cliff came down. This is plainly part of the *res gestæ*. It was unpremeditated and could hardly ~~be~~ have been made if O'Connell had not feared that it might come down. It does not depend for its probative force upon O'Connell's veracity, and therein is entirely unlike a deliberate admission made after the event.

2. Objection is made to certain instructions given at the request of plaintiff. All but one are founded upon the proposition that O'Connell was not shown to be the representative of the defendant at the time of the accident. They do not require further discussion. The other is the tenth, which is as follows:

"The burden of proof as to the defendant's or its agent's knowledge, or culpability in lacking knowledge, of any insecurity and dangerousness of said cliff is on the plaintiff; but this proof is sufficiently made out by the plaintiff when it is shown that said cliff was insecure and dangerous in such respect that if a proper inspection had been made by defendant, the insecurity and danger would have been ascertained in time to have prevented the injury."

The objection is to the use of the word "when" instead of "whenever" or "if." It is said that it assumes that such proof was made. This is against the manifest intention. A proposition is laid down in the first part of the instruction to the effect that the burden is on the plaintiff to prove certain facts; the last part simply tells what evidence is sufficient for that purpose. I do not think the jury were misled.

I recommend that the judgment and order be affirmed.

SEARLS, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

PATERSON, J., GAROUTTE, J., HARRISON, J.

Hearing in Bank denied.

BEATTY, C., J., dissented from the order denying a hearing in Bank.

MASTER AND SERVANT—MASTER'S DUTY TO FURNISH SAFE MACHINERY AND APPLIANCES.—Every master must exercise ordinary care, skill, and prudence in furnishing machinery and appliances suitable for doing the work

In hand: *Orman v. Mannix*, 17 Col. 564; 31 Am. St. Rep. 340, and note; *Kehler v. Schwenk*, 151 Pa. St. 505; 31 Am. St. Rep. 777, and note; *Mason v. Richmond etc. R. R. Co.*, 111 N. C. 482; 32 Am. St. Rep. 814; *Wagner v. Jayne Chemical Co.*, 147 Pa. St. 475; 30 Am. St. Rep. 745; *Carter v. Oliver Oil Co.*, 34 S. C. 211; 27 Am. St. Rep. 815, and note; *Kehler v. Schwenk*, 144 Pa. St. 348; 27 Am. St. Rep. 633, and note; *Pullman etc. Car Co. v. Laack*, 143 Ill. 242; *Steinhauser v. Spraul*, 114 Mo. 551; *Friel v. Citizens' Ry.*, 115 Mo. 503; *Price v. Richmond etc. Ry. Co.*, 38 S. C. 199; *Trinity County Lumber Co. v. Denham*, 85 Tex. 56; *South Florida R. R. Co. v. Weese*, 32 Fla. 212.

MASTER AND SERVANT—MASTER'S DUTY TO FURNISH SAFE PLACE TO WORK. A master is bound to furnish his servants a reasonably safe place to work: *Meir v. Morgan*, 82 Wis. 289; 33 Am. St. Rep. 39, and note; *Louisville etc. Ry. Co. v. Hanning*, 131 Ind. 528; 31 Am. St. Rep. 443; *South Florida etc. R. R. Co. v. Weese*, 32 Fla. 212; *Turner v. Haar*, 114 Mo. 335.

MASTER AND SERVANT—LIABILITY OF MASTER FOR NEGLIGENCE OF VICE-PRINCIPAL.—For the breach of a duty which a master so owes to a servant that he must perform it in person or by his agent appointed for that purpose called a vice-principal, the master is responsible to a servant injured thereby without contributory negligence: *Daniels v. Chesapeake etc. Ry. Co.*, 36 W. Va. 397; 32 Am. St. Rep. 870, and note; *Miller v. Missouri Pac. Ry. Co.*, 109 Mo. 350; 32 Am. St. Rep. 673, and note; *Daves v. Southern Pac. Co.*, 98 Cal. 19; 35 Am. St. Rep. 132, and note with the cases collected; *Zintek v. Stimson Mill Co.*, 6 Wash. 178; *Pullman etc. Car Co. v. Laack*, 143 Ill. 242.

EVIDENCE—RES GESTÆ.—DECLARATIONS OF SERVANT AFTER ACCIDENT: See *Hermes v. Chicago etc. Ry. Co.*, 80 Wis. 590; 27 Am. St. Rep. 69, and note; *Wormedorf v. Detroit etc. Ry. Co.*, 75 Mich. 472; 13 Am. St. Rep. 453, and note.

KEYES v. CYRUS.

[100 CALIFORNIA, 322.]

HOMESTEADS—A STATUTE GRANTING HOMESTEAD RIGHTS OF EXEMPTION, being remedial in its nature, should be liberally construed in favor of the manifest purpose of the legislature.

STATUTES, CONSTRUCTION OF.—HEADINGS OF CHAPTERS of the code or of any other statute may be examined for the purpose of ascertaining the intention of the legislature with respect to such chapters or statutes.

EXEMPTION OF PROBATE HOMESTEADS.—A HOMESTEAD SELECTED BY THE COURT, AND SET APART TO THE SURVIVING WIFE in proceedings to administer upon her husband's estate, is exempt from execution under any judgment for a debt existing against her in his lifetime, though the statute does not in express terms declare such exemption, if there is a general provision in the code respecting homesteads and their selection, to the effect that a homestead is exempt from execution or forced sale.

Barham and Bolton, for the appellants.

Rose and Pond, and *J. W. Oates*, for the respondents.

323 HARRISON, J. July 22, 1889, M. M. Keyes and Barbara Keyes, his wife, made their promissory note to John

Cyrus for seven thousand one hundred and seventy-five dollars, and as security for its payment executed to him a mortgage upon certain lands in Sonoma county. M. M. Keyes died October 17, 1889, and his widow Barbara was appointed administratrix of his estate, and continued to act as such until August 10, 1891, when her final accounts were settled, and she was discharged ²²³ from her trust. No homestead had been selected in the lifetime of said Keyes, and on June 30, 1890, the superior court for Sonoma county, upon due proceedings had therefor, by its order made that day, set apart as a homestead for the use of the said Barbara certain lands belonging to the estate of said Keyes other than those included in the mortgage, and on the 7th of July a copy of the said order was recorded in the office of the county recorder. The property so set apart as a homestead was community property of the said Barbara and her husband, and he left no minor children surviving him. At the time the land was set apart to her Barbara was residing thereon, and continued to reside there until December 17, 1891, when she conveyed the premises to the plaintiffs. After the death of Keyes, Cyrus presented to the administratrix a claim against his estate upon the note and mortgage, which was duly allowed and approved, and thereafter, in an action instituted in the said superior court for the foreclosure of the mortgage, a judgment was rendered against said Barbara as administratrix, and also individually, for the amount of the note, and directing a sale of the mortgaged premises, and the application of the proceeds thereof upon the judgment, and, if there should be any deficiency, that it should be docketed against said Barbara. Under this judgment the mortgaged lands were sold June 15, 1891, and the proceeds being insufficient to satisfy the judgment, the deficiency thereof, amounting to three thousand seven hundred and ninety-eight dollars, was docketed against Barbara on the 16th of June, 1891. January 5, 1892, the defendants herein, to whom Cyrus had assigned his judgment, caused an execution to be issued on this deficiency judgment, and placed in the hands of the sheriff under which he levied upon the lands that had been set apart to Barbara, and was advertising the same for sale when the plaintiffs brought this action to restrain the said sale. Judgment was rendered in their favor, and the defendants have appealed.

The cause is brought here upon the judgment-roll ²²⁴ alone, and the question presented for determination is

whether a homestead set apart to the widow by the superior court under the provisions of section 1465 of the Code of Civil Procedure is liable to forced sale for a debt contracted by her previous to the death of her husband. The affirmative of this proposition is maintained by the appellants upon the ground that the section of the statute authorizing the court to set apart a homestead out of the estate of a decedent contains no express declaration that when set apart it shall be exempt from forced sale, while on the part of the respondents it is contended that every legal homestead, whether made so by voluntary selection or by the action of the court, is exempt from a forced sale.

The word "homestead" has both a popular and a legal signification. In its popular sense it signifies the place of the home—the residence of the family; "it represents the dwelling-house at which the family resides, with the usual and customary appurtenances, including the outbuildings of every kind necessary or convenient for family use, and lands used for the purposes thereof": *Gregg v. Bostwick*, 33 Cal. 227; 91 Am. Dec. 637. It is in this sense that the word is used in the constitution, and also in the statute; in other words it is the actual homestead to which they refer, and to which they purport to add certain legal incidents. The term itself is nearly as old as the English language, but its use in legislation is quite modern, and is peculiarly American. The ultimate object of all legislation respecting the homestead is to protect the family in the right to preserve their home, both from their own improvidence, and also from the rapacity of their creditors; and, in view of this fact, it is proper to assume that any legislation upon the subject of the homestead is intended for its protection, and that when the legislature has made provision for setting apart a homestead out of the property of a decedent it was its intention that it should be exempt from forced sale. Such statutes, being remedial in their nature, are to be construed ²²⁵ liberally, and in favor of carrying out the manifest purpose of the legislature, rather than that their operation be restricted to the strict letter in which they are framed. The policy of such legislation has never been questioned. It is in furtherance of the welfare of the state that its citizens shall be a permanent body, whose individual interests in its prosperity and development shall, as far as possible, be identified with the public interest.

A consideration of the terms used in the chapter of the

Code of Civil Procedure in which section 1465 is contained, corroborates the conclusion that the legislature intended that the homestead set apart under its provisions should have the legal incident of exemption from forced sale. The chapter is itself entitled: "Of the provision for the support of the family and of the homestead," and the heading to article 1 of the chapter in which this particular section is found is: "Of the provision for the support of the family." These headings are a portion of the statute, and may be examined for the purpose of determining the particular intent of the legislature with regard to the chapters in which they are placed: *Barnes v. Jones*, 51 Cal. 306. Section 1465 itself provides that if no homestead has been selected in the lifetime of the decedent the court must select a homestead "for the use of the surviving husband or wife and the minor children," and section 1466 provides that if the amount set apart under this section be insufficient for the support of the family, the court must make a further allowance for their maintenance, thus showing that whatever is set apart under section 1465 is for the "support" as well as the "use" of the family. The authority given to the court in the first part of section 1465 to set apart for the family "all the property exempt from execution, including the homestead selected," implies that the property, when set apart, is exempt from execution; and the subsequent provision therein for setting apart a homestead in case none has been selected during the lifetime of the decedent ³²⁶ also implies that such homestead has the same exemption from forced sale as a homestead that had been selected by the decedent in his lifetime. The manifest object of the section is the support of the family, and to make provision for their support and maintenance. These demands of the family are deemed superior to those of heirs or creditors. "Setting apart a homestead is a part of the probate proceeding as much as is a family allowance." "It is a right bestowed by the beneficence of the law of this state for the benefit of the family": *Estate of Moore*, 57 Cal. 442. A homestead may be set apart to the widow, even though the estate be insolvent, and the property so set apart constitute the entire estate of the decedent; but if the homestead thus set apart to her could be immediately taken in execution by one of her creditors it would fail to be available for her use or support, and it might happen that her creditor would fare better than a creditor of the decedent, whose money had perhaps been used to purchase

the very property so set apart. The question here presented was not involved in *Estate of Walley*, 11 Nev. 260, and what was said thereon in the opinion in that case was not concurred in by the full court.

As the general policy of the law is to protect the homestead of the family, the foregoing construction of this section harmonizes with that policy, and is consistent, rather than in conflict, with the provisions of the Civil Code for creating a homestead. Those provisions do not, either in terms or by implication, make that the exclusive mode of impressing the actual homestead with the legal incident of exemption from forced sale. They relate exclusively to its voluntary selection, and afford a mode of designating it, and making it a matter of record, so that the world may have notice of the property which constitutes the actual homestead. A homestead selected under these provisions has also certain other incidents in addition to its exemption from forced sale, such, for example, as the character of the estate created thereby, and the right of survivorship ³²⁷ incident to that estate. Section 1240 of the Civil Code, which declares that "the homestead is exempt from execution or forced sale, except as in this title provided," is not in terms limited to the homestead selected by the parties, and, as the codes are to be construed as a single statute (Pol. Code, sec. 4480), the provisions of this section must be held to apply to every homestead, whether selected and recorded by the voluntary act of the parties or by an order of the superior court.

The judgment is affirmed.

McFARLAND, J., DE HAVEN, J., GAROUTTE, J., FITZGERALD, J., and PATERSON, J., concurred.

BEATTY, C. J., dissenting. I dissent upon grounds which are fully stated in my opinion in *Estate of Walley*, 11 Nev. 260.

The homestead set apart by the probate court goes to the surviving husband or wife freed of all liability for any debt of the deceased spouse; but there is no provision of law exempting it from liability for debts of the survivor, whether contracted before or after the order setting it apart, and nothing therefore to prevent the operation of the general rule prescribed by section 688 of the Code of Civil Procedure.

Nor is it at all necessary in order to subserve the general policy of the law to construe the statute as it is construed in

the opinion of the court. When a homestead has been set apart by the probate court to a widow, and thus exempted from the claims of creditors of the deceased husband, if she desires to exempt it from the claims of her own creditors she has only to make a declaration as head of a family, if she has children or other dependent relatives residing with her, in which case it is exempt to the full value of five thousand dollars; or, if she has no children or dependent relatives, she can, like others similarly situated, secure exemption to the extent of one thousand dollars. This ²²⁸ gives her all the advantages of other persons in her situation, and I can see no reason for giving her any greater right as against the debts that she voluntarily contracts.

HOMESTEAD STATUTES—CONSTRUCTION OF.—The homestead law is remedial in its character, and is to receive a liberal construction to carry into effect its beneficent provisions: *Mitchelson v. Smith*, 28 Neb. 583; 26 Am. St. Rep. 357, and note; *Riggs v. Sterling*, 60 Mich. 643; 1 Am. St. Rep. 554, and note.

STATUTES—CONSTRUCTION OF.—The title of an act may be referred to for the purpose of ascertaining the intent of the legislature, when not clearly manifest in the body of the act: *Blakeney v. Blakeney*, 6 Port. 109; 30 Am. Dec. 574; *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684; and the preamble of an act may be examined for the same purpose: *White v. Levy*, 91 Ala. 175; *Bynum v. Clark*, 3 McCord, 298; 15 Am. Dec. 633; *Sutherland v. De Leon*, 1 Tex. 250; 46 Am. Dec. 100, and note with the cases collected. But the character of every statute is determined by its provisions, and not by its title, as to whether it is general or local: *People v. McCann*, 16 N. Y. 58; 69 Am. Dec. 642.

LOWE v. WOODS.

[100 CALIFORNIA, 408.]

LIEN OF STABLE-KEEPER for the board and keeping of horses intrusted to him does not exist when the person making the contract for such board and care is not the owner, though the statute declares that livery or boarding or feed stable proprietors, and persons pasturing horses or stock have a lien dependent on possession for their compensation in caring for, boarding, feeding, or pasturing such horses or stock. The rule of *caveat emptor* applies against the lien claimant.

▲ **LIEN CAN GENERALLY BE CREATED ONLY BY THE OWNER OF PROPERTY** or by some person by him authorized. Hence, one having possession of a horse under an agreement to purchase by which the vendor retains title until such payment is made, cannot, as against the vendor, create a lien for its board and care.

F. Adams and F. A. Dorn, for the appellant.

Wilcoxon and Bouldin, and J. M. Wilcoxon, for the respondents.

409 GAROUTTE, J. This is an action brought by livery and feed stable keepers to foreclose a lien upon a horse for the feeding of the animal. The horse was placed by defendant Woods in charge of plaintiffs, he agreeing to pay the sum of twenty dollars per month for his care and feed. At this time Woods was in possession under a contract of purchase from the defendant, Adams, the true owner, the agreement between them being that he should have the use of the horse, and should feed and care for him, but that the title should remain in Adams until the sum agreed upon was paid; and that event never came to pass. It was further expressly stipulated by these parties that Woods should keep the horse without 410 cost or expense to Adams, and that upon his failure to pay the amount stipulated it should be redelivered without cost or expense. This appeal is prosecuted by defendant Adams from a judgment foreclosing the lien and ordering a sale of the horse.

Among other matters, it is found by the trial court that Adams was at all the times mentioned in the complaint the owner of the horse; that Woods informed plaintiffs at the time they received the horse that Adams was the owner thereof, and within one week thereafter plaintiffs had full knowledge of the terms and conditions of the contract by virtue of which Woods had possession. It thus appears that the court not only found the ownership of the horse to be in appellant Adams, but found that respondents had knowledge of the fact upon the first day of their possession, and within a few days subsequent thereto had complete and perfect information of all the circumstances surrounding Woods' possession. There is certainly no principle of law that would entitle plaintiffs to a lien upon this horse after they became conversant with the character of Woods' possession, and all the terms of the agreement under which he held. But we will not consider the effect of the finding of the court that plaintiffs were informed by Woods when the horse was placed in their care that Adams was the owner thereof, as we are prepared to take a broader view and hold that in this case, as disclosed by its entire history, no lien whatever was created in favor of plaintiffs.

That portion of section 3051 of the Civil Code bearing upon this question is as follows: "And livery or boarding, or feed stable proprietors, and persons pasturing horses or stock, have a lien dependent on possession for their compensation in

caring for, boarding, feeding, or pasturing such horses or stock." In *Dorman v. Green*, 4 Tex. App. Civ. Cas. 563, under a statute in all material respects similar to the provisions of our code, and upon a state of facts involving the principle presented in this appeal, the supreme court of that state said: "This is not a question of notice, but a matter of property right ⁴¹¹ in which the doctrine of *caveat emptor* applies. In order for the statutory lien to attach it is necessary that the animal be placed with the livery-keeper by its owner, or some one having authority from him." In *Stott v. Scott*, 68 Tex. 304, the court said: "There is nothing in this statute to indicate an intention to give such a lien on property which may be placed in such a stable as is mentioned by some person, neither the owner nor the agent of the owner. It has been held that the lien given by the common law to an inn-keeper upon the horse of a traveler who becomes his guest will attach, although the guest may have stolen the horse, but it is not believed that such a lien has ever been held to exist upon property placed with one who has a lien only by force of a statute, by a person not the owner or the agent of the owners."

Under a quite similar statute the supreme court of New Hampshire, in *Sargent v. Usher*, 55 N. H. 287, 20 Am. Rep. 208, said: "The idea that a lien may be created by a contract of the possessor of animals for their keeping, the owner being in no way privy to such contract, when no rights whatever as against the owner could be conferred or created by a contract of sale, seems anomalous to say the least. Such a thing would, as it seems to me, be a violation of the fundamental rights of property guaranteed by the constitution, and if the legislature had undertaken by this act to create a lien to arise on such a state of facts, I think it would be the duty of the court, as more than intimated by Foster, J., in *Jacobs v. Knapp*, 50 N. H. 82, to hold the act so far unconstitutional and void." And in the same case Cushing, C. J., said: "Now, there seems no good reason why a party not the owner should be permitted to pledge the property or create a lien upon it, either at common law or by statute, any more than he should be permitted to sell it. Neither is there any good reason why a person who is about to establish relations with another out of which a lien would be created should not make the same inquiries which would be incumbent on him to make if ⁴¹² he were going to purchase the property. . . .

It is claimed in the plaintiff's brief that Robinson ought to be considered in law as agent of the defendant, but I have seen no case in which it has been held that a party who permits another to have possession of his personal property, by so doing in law constitutes that other his agent to sell or pledge that property." In *Small v. Robinson*, 69 Me. 425, 31 Am. Rep. 299, it was held that a hackman having the possession of a hack, upon terms similar to those upon which Woods was in possession of this horse, had no interest in the hack that would allow him to create a lien upon it for repairs, the court quoting the language of Shaw, C. J., in *Hollingsworth v. Dow*, 19 Pick. 228, wherein he said: "A lien is a proprietary interest, a qualified ownership, and in general can only be created by the owner or by some person by him authorized." The principle of law here involved is also fully discussed in *Robinson v. Baker*, 5 Cush. 137; 51 Am. Dec. 54; *Jacobs v. Knapp*, 50 N. H. 71; and *Hollingsworth v. Dow*, 19 Pick. 228.

At the time Woods placed the horse in the custody of plaintiffs, defendant Adams was the owner. The title was in her; the court so found under the agreement, and authority in law is not lacking to support the finding: *Kohler v. Hayes*, 41 Cal. 455; *Hegler v. Eddy*, 53 Cal. 598. Adams being the owner of the horse, without her consent Woods could not sell it; he could not pledge it; neither had he the power to create a lien upon it by placing it in the hands of an agistor. Without any contract upon appellant's part, without any personal liability whatever, without her consent in any form, and even without any notice to her of the facts which are claimed to have created the lien, it is now sought to take her property and apply it to the satisfaction of Woods' debt. Such a practice would be violative of the fundamental principle of law that no man's property can be taken from him without his consent.

Respondents' counsel rely upon *Chuch v. Garrison*, 75 Cal. 199, to support the judgment attacked by this appeal. 413 The question was there presented upon a general demurrer to a complaint in intervention. The decision of the court is not as full and explicit as it might have been, but, as we construe it, it is there decided that actual ownership of the machine by the parties hiring the work done was not necessary to give plaintiffs a standing in court. In a limited sense this is true, and only in a limited sense. It was never intended to hold that a thief by his contract with an agistor or mechanic could create a lien upon the stolen property, or that a stranger, in

no way in privity with the true owner, could create such a lien. Aside from the question of estoppel of the owner by reason of his negligence, and we have no such question presented in this case, the lien can only be created by the owner, or by some one duly authorized to act for him. English authorities, and some early American cases, have recognized a different rule as to common carriers and innkeepers, but as to common carriers the law declared in those cases was held unsound in *Robinson v. Baker*, 5 Cush. 137; 51 Am. Rep. 54; and we have no doubt that as to innkeepers the true rule forms no exception to the general principle we have declared.

For the foregoing reasons it is ordered that the judgment be reversed and the cause remanded.

HARRISON, J., concurred.

PATERSON, J. I concur in the judgment on the first ground stated by Mr. Justice Garoutte.

LIENS.—AGISTORS AND LIVERY-STABLE KEEPERS HAVE NO LIEN for keeping or pasturing animals intrusted to them: *Grinnell v. Cook*, 3 Hill, 485; 38 Am. Dec. 663, and note; *Miller v. Marston*, 35 Me. 153; 56 Am. Dec. 694, and note; note to *McIntyre v. Carver*, 37 Am. Dec. 522. An agistor to whom cattle have been intrusted by the mortgagor of them, without the knowledge or consent of the mortgagee, has no lien on them as against the latter: *Sargent v. Usher*, 55 N. H. 287; 20 Am. Rep. 208. A bailee of personal property can impose no liens for repairs on the property bailed as against the owner, without his knowledge or consent: *Small v. Robinson*, 69 Me. 425; 31 Am. Rep. 299; *Robinson v. Baker*, 5 Cush. 137; 51 Am. Dec. 54.

PEOPLE v. COUNTY OF GLENN.

[100 CALIFORNIA, 419.]

CONSTITUTIONAL LAW—URGENCY, SEVERAL CASES OF, MAY BE CONSIDERED TOGETHER.—If a constitution declares that a bill shall be read on three several days before being placed in its final passage, unless in a case of urgency, two-thirds of the house where such bill may be pending, by a vote of ayes and nays, dispenses with this provision, the house may exercise this dispensing power with respect to two or more bills at the same time, and by one declaration of its purpose; nor does the fact that several of the members of the house voting to declare a bill a case of urgency, voted against it on its final passage, deprive the vote of urgency of its force, or impair the validity of the bill.

CONSTITUTIONAL LAW.—IT IS NOT MATERIAL TO A BILL PROVIDING FOR THE ORGANIZATION of a new county, that many of its provisions are intended to be only preliminary and temporary, as, that the first election for supervisors shall take place before the county has been divided into supervisor districts.

Stanley, Hayes, McEnerney, and Bradley, H. M. Albery and Attorney General W. H. H. Hart, for the appellant.

Aylett R. Cotton and J. C. Campbell, for the respondent.

420 MCFARLAND, J. On March 11, 1891, an act of the legislature was approved, entitled, "An act to create the county of Glenn, to establish the boundaries thereof, and to provide for its organization" (Stats. of 1891, p. 96); and defendant claims that in pursuance of the **421** provisions of that act the county of Glenn became duly organized. For some time past defendant has been exercising the ordinary functions of a county government, and has been recognized as such by the political and executive departments of the state government. This present proceeding was brought in the superior court, in the name of the people, to have it judicially decreed that said county of Glenn "is not legally organized, and is not a separate county government"; that it has usurped the franchise of a public corporation, and that it be precluded from exercising the same, etc. To the complaint defendant interposed a demurrer upon general as well as upon many special grounds. The demurrer was sustained; and plaintiffs declining to further amend, judgment was rendered for defendant. Plaintiffs appeal.

The only point presented by appellants at the oral argument, and the main one made in their brief, is, that said act providing for the creation of Glenn county was not, before its passage by the state senate, "read on three several days" in that branch of the legislature, in accordance with the provision of section 15 of article 4 of the state constitution; that such provision was not dispensed with by a two-thirds vote of the senate, as may be done under that section; and that, therefore, said act is unconstitutional, and void.

The complaint avers that said act—which had been regularly passed in the assembly, and was designated as Assembly Bill No. 185—was not read on three several days before its passage in that body. But the complaint also shows that before its passage in the senate a resolution was there adopted by a two-thirds vote, by which it was resolved that said act—Assembly Bill No. 185—and also a number of other bills, "present cases of urgency as that term is used in section 15 of article 4 of the constitution, and the provision of that section requiring that the bills shall be read on three several days in each house is hereby dispensed with, and it is ordered," etc.

422 The only objection to the dispensing resolution is, that it included other bills as well as the one now in question. But the constitution does not undertake to provide the form, or to set limitations to the manner in which the dispensing power shall be exercised. The words are simply: "Unless, in a case of urgency, two-thirds of the house where such bill may be pending shall, by a vote of yeas or naves, dispense with this provision." It merely provides that a bill shall be read on three different days in each house, unless such house by a two-thirds vote shall, in some appropriate form, dispense with that necessity. This was done in the case at bar with respect to the bill in question—the bill being expressly named in the resolution. The main virtue of the provision is evidently the requirement of a two-thirds vote. The constitution does not, either expressly or by necessary implication, prohibit the senate from exercising its dispensing power with respect to two or more bills by one declaration of its purpose; and the unquestioned rule with respect to American states is, that the legislature may exercise all legislative power not prohibited to it by the constitution. The judiciary, when called upon to determine what the law is that applies to an action regularly pending in a court, is sometimes forced to say that a particular act of the legislature invoked by one of the parties to the action is not law, because in conflict with the higher law—the constitution; but it will exercise that delicate power only in cases where the legislature in passing the act in question did clearly violate some prohibitory clause of the constitution. To otherwise exercise it would be to confound the distinction between the co-ordinate departments of the government. And, in the case at bar, to hold here that the Glenn County Act is unconstitutional, for the reason assigned, would simply be to substitute our judgment of the propriety of certain legislative action for that of the legislators themselves, whose judgment in the premises was under the constitution supreme and final.

423 It is averred in the complaint that several of the senators who voted to declare the Glenn County Bill a case of urgency afterwards voted against the bill on its final passage. This averment is clearly of no value. It was made to indicate that such senators may have voted in the first instance through improper motives. In the first place, if motives could be at all inquired into here, we would not hunt after bad motives for an act when worthy motives were apparent.

For instance, a legislator, although opposed to a certain bill, might well vote to dispense with the readings on different days because he thought that the public interest required speedy action on the subject; or it might well be that between the first and second vote he had changed his views as to the policy of the bill. Other creditable motives could easily be suggested. But the motives which induced legislative action are not a subject of judicial inquiry; and a legislative act cannot be declared unconstitutional because, in the opinion of a court, it was or might have been the result of improper considerations. A court is neither the director of the discretion of a legislator nor the keeper of his conscience.

The case of *Bloom v. Xenia*, 32 Ohio St. 461, cited and relied on by appellants, is not authority for them, but is authority against them. The case involved the validity of an ordinance of a municipal corporation; and the facts were that the rules were suspended generally, without special mention of the ordinance in question, and then, after a certain other ordinance had been passed, the ordinance in question was passed without any further suspension of the rules. But the court elaborately shows the distinction between a municipal corporation with granted and limited powers and the legislature of a state with powers unlimited except by prohibition of the constitution. The court say: "The efforts of courts are to sustain acts of the legislature; they will not be declared unconstitutional unless clearly so. . . . By the terms of the organic law the legislative power of the state is declared to be vested in the ⁴²⁴ general assembly. The grant of power is general, not special; it embraces all such legislative power as the people of the state could, under the federal constitution, confer—the whole legislative power of the state. The limitations upon the exercise of this power thus broadly confined are special, and are to be found in other parts of the instrument. When, therefore, the power of the legislature to enact a general law is disputed, the proper question is whether such exercise of legislative power is clearly prohibited by the constitution."

There are other points made by appellants in their brief which we do not deem necessary to be largely discussed. They are in great part answered by the decision of this court in *People v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66, which involved the validity of the act creating the county of Orange. It must be remembered that, as held in the case just cited, an act creating and providing for the original organization of

a new county is not within the prohibitions of the constitution against special and local legislation; and this consideration parries most of the additional thrusts made in the brief at the validity of the Glenn County Act. Many of the provisions of an act creating a new county are intended to be only preliminary and temporary, and are necessary to put the new political subdivision on its feet, so that at the expiration of time limited for the existence of the temporary expedients, the county may, in due course, take its place under the general law for the government of organized counties. And as there is no limitation upon the means which may be employed for this preliminary organization of a county, it is not fatal to the Glenn County Bill that it does not itself provide for the division of the proposed county into supervisor districts, but allows five supervisors to be, in the first instance, elected at large, who have power under the general law to divide the county into districts. Neither do we see any thing in the objection to the manner in which the election at which the voters of the proposed new county expressed their will was held. It was held in accordance ⁴²⁵ with the provisions of the act itself, and by subdivision 11, section 25, article 4, of the constitution, there may be a special law for holding and conducting an election "on the organization of new counties." There are in the complaint some attempted allegations of fraud at the election; but if the determination of the commissioners appointed by the act to superintend the election and declare the result is not conclusive of that point in the absence of any law for contesting such an election, still the said allegations are only of conclusions of law, and state no facts sufficient to constitute such fraud. There were special demurrers on that point, and they were properly sustained. There are no other points necessary to be specially mentioned.

The judgment appealed from is affirmed.

DE HAVEN, J., and FITZGERALD, J., concurred.

STATUTES—ENACTMENT OF.—Every substantial part of a proposed enactment is a "bill" within the constitutional sense of the term, and must pass through all the constitutional stages of enactment before it becomes a law: *State v. Platt*, 2 S. C. 150; 16 Am. Rep. 647. That an act of the legislature is passed and becomes a law only when it has gone through all the forms made necessary by the constitution to give it force and effect is maintained by the line of cases cited in the note to *People v. Starne*, 85 Am. Dec. 357. See, also, *Dew v. Cunningham*, 28 Ala. 466; 65 Am. Dec. 362.

PEOPLE v. SHORB.

[100 CALIFORNIA, 587.]

A PUBLIC OFFICE BECOMES VACANT UPON THE ABSENCE OF THE INCUMBENT FROM THE STATE for more than sixty days, though such absence is made necessary by his health, if the statute declares that an officer shall in no case absent himself from the state for a period of more than sixty days, and that an office becomes vacant on the absence of an officer from the state, without permission of the legislature, beyond the period allowed by law. No official notice to the appointing power is required. It may therefore appoint an incumbent to fill the vacancy, but such appointment does not conclude the person whose office is to be filled from proving that the assumed cause of vacancy never, in fact, existed.

Smith and Winder, for the appellants.

Attorney General W. H. H. Hart, District Attorney H. C. Dillon, and McLachlan and York, for the respondent.

528 VANCLIEF, C. The defendant Shorb was elected treasurer of the county of Los Angeles in November 1892, and, having duly qualified, commenced to discharge the duties of that office January 2, 1893. The other defendants are his appointed and duly qualified deputies, who were acting as such before and at the time of the commencement of this action.

The action is of the nature of a *quo warranto* information, and is prosecuted by the attorney general on the relation of T. J. Fleming, who claims the office of treasurer by virtue of an appointment thereto by the board of supervisors of Los Angeles county.

The plaintiff alleges, in substance, that on July 14, 1893, Shorb left this state, and has ever since remained, and now (September 25th) is absent from this state without the consent of the legislature and without the consent of the board of supervisors of said county for a longer period than sixty days from July 14, 1893; that by reason of such absence from the state the office of treasurer of said county became vacant on September 13, 1893; that on September 15, 1893, the board of supervisors of said county appointed the relator, T. J. Fleming, to fill the vacancy; that after having duly qualified, Fleming on September 25, 1893, demanded of the defendants, who were then conducting the business of the office as deputies of Shorb, the records of the office, together with all moneys of the county deposited in the office and then in their custody; but that said deputies refused to comply with such demand.

The prayer of the complaint is for judgment, that none of the defendants is entitled to the office of deputy treasurer, nor to the custody of the records or moneys appertaining to that office; and that the relator, Fleming, is entitled to the office of treasurer, and that he be put in possession thereof, and of all records and moneys belonging thereto.

The defendant, Shorb, was not served with process, and did not appear, and as to him the action was dismissed.

The other defendants filed a general demurrer to the ⁵³⁹ complaint, and answered at the same time; and plaintiff filed a general demurrer to the answer.

The demurrer to the complaint was overruled, and the demurrer to the answer was sustained. The answer not being amended, judgment was rendered in favor of plaintiff against the defendants other than Shorb, according to the prayer of the complaint.

The defendants, except Shorb, have appealed from the judgment upon the judgment-roll without any bill of exceptions.

The answer admits all the facts alleged in the complaint; but, as affirmative new matter of defense, alleges, in substance, that Shorb has been unwillingly, but necessarily, absent from the state on account of his serious and dangerous illness "severe nervous prostration" for proper treatment of which, he was advised by his physicians, it was necessary that he should go to the city of Philadelphia; that pursuant to such advice he left this state and has not sufficiently recovered his health to enable him to return without danger of fatal consequences; but that defendants have such information of his convalescence as warrants their expectation and belief that he will soon return to this state.

1. It is contended for appellants that the absence of Shorb from the state for any period would not, *ipso facto*, effect a vacancy of his office; that the vacating of an office by absence of the incumbent from the state is a statutory penalty of the nature of a forfeiture, which can be enforced only through legal proceedings in which the incumbent must have his day in court.

I think, however, this position cannot be sustained, as it seems to depend upon a misconstruction of sections 996 and 4120 of the Political Code, which are as follows:

"SEC. 996. An office becomes vacant on the happening of either of the following events before the expiration of the

term: 1. The death of the incumbent; 2. His insanity found upon a commission of lunacy issued to determine the fact; 3. His resignation; 4. ⁵⁴⁰ His removal from office; 5. His ceasing to be an inhabitant of the state, or, if the office be local, of the district, county, city or township for which he was chosen or appointed, or within which the duties of his office are required to be discharged; 6. His absence from the state without permission of the legislature beyond the period allowed by law; 7. His ceasing to discharge the duties of his office for the period of three consecutive months, except when prevented by sickness, or when absent from the state by permission of the legislature; 8. His conviction of a felony, or of any offense involving a violation of his official duties; 9. His refusal or neglect to file his official oath or bond within the time prescribed; 10. The decision of a competent tribunal declaring void his election or appointment."

"SEC. 4120. A county officer shall in no case absent himself from the state for a period of more than sixty days, and for no period without the consent of the board of supervisors of his county."

The ten events mentioned in section 996 are merely conditions, upon the occurrence of any one of which the legislature has declared the office shall become vacant, not as a penalty or forfeiture, but simply as the legal effect of the happening of any one of the events mentioned. It is true that the occurrence of some of these events is conclusively established against the incumbent of the office by the finding or judgment of a competent tribunal, namely, his insanity, his removal from office, his conviction of a felony, and the invalidity of his election. But in all these cases he has his day in court; and section 997 of the Political Code requires that "the body, judge, or officer before whom the proceedings were had must give notice thereof to the officer empowered to fill the vacancy." But no official notice to the appointing power of the happening of any of the other events mentioned in section 996 is required; and, therefore, upon any kind of satisfactory evidence of the occurrence of any one of them, the appointing officer or board may make an appointment, though the incumbent of ⁵⁴¹ the office is not thereby concluded as to the fact of the occurrence of such event. He may still question and contest the allegation of that fact, either before or after the installation of the appointee, before such installation, if he refuse to vacate the office, in an action by the people to

oust him; or, after such installation, in an action by the people on his relation to oust the appointee. Thus he may always have his day in court before it can be conclusively adjudged against him that the office was vacant at the time the appointment was made.

The absence of Shorb from the state as alleged and admitted, *ipso facto*, effected a vacancy of the office of treasurer, and consequently a vacancy of the office of each of his deputies, the appellants, who have had their day in court, and have admitted all the facts essential to plaintiff's cause of action against them. Of course, Shorb is not concluded by their admissions, since they do not represent him in this action, and he is not a party to it.

I think the foregoing construction, 996 of the Political Code, warranted by the decision of Department Two of this court in case of the *People v. Brite*, 55 Cal. 79.

2. The complaint shows that the official bond of the relator was approved by only four of the six judges of Los Angeles county, the other two judges having been absent from the county at the time; and for this reason it is claimed that the general demurrer to the complaint should have been sustained.

By section 69 of the County Government Act the bond is required to be approved "by the judge or judges, if there be more than one, of the superior court."

The judgment ousting the defendants does not rest upon the relator's right to the office (Code Civ. Proc., secs. 803 et seq.), and therefore they were not interested in the question as to whether his bond had been properly approved, and their general demurrer did not raise that question. The complaint being good as against them their demurrer was properly overruled: *Flynn v. Abbott*, 16 Cal. 359. It is therefore unnecessary to ⁵⁴² decide whether or not the approval of relator's bond was sufficient.

3. What is said under the first head sufficiently answers appellant's contention that the absence of Shorb from the state was necessary to his health, and that its continuance beyond the period limited by law was inevitable by reason of his sickness.

The legislature has made no exception to or qualification of the rule that the continuous absence of a county officer from the state for a period exceeding sixty days, without consent of the legislature or board of supervisors, shall absolutely

effect a vacancy of his office which may be filled by appointment; and courts have no power to interpolate any exception or qualification. The object and effect of the rule are to protect the interest of the public, and it is not perceived that it works the least injustice to an incumbent of an office. In effect it is only a contingent limitation of the term of an office, subject to which the office is voluntarily taken and generally eagerly sought.

I think the judgment should be affirmed.

HAYNES, C., and BELCHER, C., concurred.

For the reason given in the foregoing opinion, the judgment appealed from is affirmed.

GAROUTTE, J., PATERSON, J., HARRISON, J.,
McFARLAND, J., DE HAVEN, J., BEATTY, C. J.

OFFICERS—FORFEITURE OF TITLE TO OFFICE.—This question is treated at length in the monographic note to *State v. Allen*, 83 Am. Dec. 372. As to when a change of residence of an officer will cause a forfeiture of his office, see *State v. Craig*, 132 Ind. 54; 32 Am. St. Rep. 237, and note.

BROWN v. CAMPBELL.

[100 CALIFORNIA, 635.]

JUDGMENTS.—IF A NONRESIDENT IS NOT PERSONALLY SERVED WITH PROCESS WITHIN THE STATE and does not appear in the action, no valid personal judgment can be entered against him, unless his property is attached in the action, and the effect of such judgment is restricted to the property so attached.

ATTACHMENT OF LAND WHICH IS SUBJECT TO A TRUST DEED TO SECURE THE PAYMENT OF INDEBTEDNESS constitutes a lien upon funds remaining in the hands of the trustees after they have sold the land and from the proceeds of the sale satisfied such indebtedness.

STATUTE OF LIMITATIONS IN AN ACTION TO SUBJECT PROPERTY FRAUDULENTLY CONVEYED to the payment of plaintiff's judgment does not begin to run at the date of such conveyance, but only on the recovery of the judgment, because until it was obtained, plaintiff had no cause of action.

FRAUDULENT CONVEYANCE.—THE RECOVERY OF A JUDGMENT IN ANOTHER STATE does not make the plaintiff a judgment creditor within this state having the right to attack a conveyance of his debtor on the ground that it was made to defraud creditors.

FRAUDULENT CONVEYANCE, WHO MAY ATTACK.—No creditor can be said to be delayed, hindered, or defrauded by any conveyance until some property, out of which he has a specific right to be satisfied, is withdrawn from his reach by a fraudulent conveyance. This specific right does not exist until he has bound the property by a judgment, or by a

judgment and execution, as the case may be, and has shown that he is defrauded by the conveyance in consequence of not being able to procure satisfaction of his debt in due course of law.

RES JUDICATA.—A JUDGMENT FROM WHICH A RIGHT OF APPEAL EXISTS cannot support a plea of *res judicata*.

JUDGMENT AS A GROUND FOR CONTINUANCE.—If a judgment has been rendered in an action which cannot be pleaded as a bar because the right of appeal therefrom still exists, and a second action is brought involving the same issues, the first action and the judgment therein constitute a good ground for the continuance of the second until the final determination of the former action.

James A. Waymire, for the appellant, and *William T. Baggett*, for the intervenor.

T. Z. Blakeman, for the respondent.

H. C. Campbell, for the defendants Campbell and Kent.

639 **DE HAVEN, J.** This action was originally brought by the plaintiff against the defendants, Campbell and Kent, to recover the sum of two thousand five hundred and forty-nine dollars and fifty cents, surplus in their hands, arising upon the sale of certain real property conveyed to them in trust to secure an indebtedness of plaintiff to the San Francisco Savings Union. These defendants answered admitting that after the payment of plaintiff's indebtedness secured by the trust deed there remained in their hands the sum demanded by plaintiff; but they also alleged that one Priest claimed to be entitled to recover such surplus, and they asked for an order requiring him to be brought into court as a party to the action, and that they be permitted to pay the fund in controversy into court, to be disposed of by the judgment in the action. This order was made, and thereafter Priest filed an answer, and also a cross-complaint, in which he alleged in substance, that, prior to the sale of the real property by the defendants, Campbell and Kent, under the deed of trust, he had levied an attachment upon such property in an action brought by him against one Joseph Brown in one of the superior courts of this state to enforce a personal demand, and in that action he recovered a judgment on April 5, 1887, for a sum exceeding eight thousand dollars; and that he again attached the same property prior to the sale under the trust deed in another action brought by him in this state against Joseph Brown, and in which latter action he recovered a judgment against Brown on January 8, 1888, for the sum of nine thousand three hundred 640 and fifty-three dollars and fifty

cents. The cross-complaint further alleges "that both of said judgments are for one and the same cause of action, and both were recovered against the said Joseph Brown (who was not a resident of the state of California) upon constructive service of summons." Priest further alleged in his cross-complaint that the land sold under the trust deed was the property of his said debtor, Joseph Brown, and was conveyed by him to the plaintiff on October 3, 1883, for the purpose of hindering, delaying, and defrauding the creditors of such debtor.

The Anglo-Californian Bank was also permitted to intervene, and claims a right to a portion of the fund in controversy by virtue of a mortgage executed by the plaintiff subsequent to the date of the deed of trust above referred to.

The plaintiff and the intervenor demurred to the cross-complaint of the defendant, Priest, upon the ground, among others, that the cause of action therein stated is barred by certain sections of the Code of Civil Procedure prescribing the limitation for actions, and, the demurrer being overruled, they filed an answer to the cross-complaint.

This action was tried by the court without a jury, and, upon the findings made, judgment was rendered in favor of the defendant, Priest, in accordance with the prayer of his cross-complaint. The plaintiff and the Anglo-Californian Bank, intervenor, have appealed.

The questions arising on this appeal are: 1. Did the defendant, Priest, secure a lien upon the fund in controversy by reason of the attachment proceedings in either of his actions against Joseph Brown? 2. Is the cause of action stated in the cross-complaint barred by the statute of limitations? 3. Is the right of Priest to the relief given him by the judgment appealed from barred by a judgment in a former action brought by him against the plaintiff and the other defendants, and which involved substantially the same matters embraced ⁶⁴¹ in the cross-complaint in this action? and lastly, Are the findings of the court justified by the evidence?

In an action against a nonresident for the recovery of money, when there has been no personal service of process on the defendant within the state in which the action is pending, and no appearance therein by the defendant, no judgment can be given other than one in the nature of, or having the nature of, a judgment *in rem* against such property of the nonresident as may have been specifically attached in such action: *Anderson v. Goff*, 72 Cal. 65; 1 Am. St. Rep. 34; *Blanc*

v. *Paymaster Mining Co.*, 95 Cal. 524; 29 Am. St. Rep. 149; *Pennoyer v. Neff*, 95 U. S. 741; *Cooper v. Reynolds*, 10 Wall. 308. In this latter case, in discussing the effect of a judgment in an action brought to establish a personal demand against a nonresident only constructively served with process, and in which an attachment is levied upon the property of the defendant, Mr. Justice Miller, speaking for the supreme court of the United States, said: "If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable under the control of the court to answer to any demand which may be established against the defendant by the final judgment of the court; but if there is no appearance of the defendant, and no service of process upon him, the case becomes in its essential nature a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. . . . No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court, or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit."

642 Such being the well-established rule of law, it follows that inasmuch as Joseph Brown was a nonresident, and not personally served with process within this state in either of the actions of *Priest v. Brown*, the question whether there was made in either of those actions any valid attachment upon the property involved here is a material one; for unless such attachment was made, the defendant, Priest, is not entitled to subject the fund in controversy here to the payment of either of the judgments obtained by him against Joseph Brown.

It is argued by the appellant that the attachment in neither of the actions of *Priest v. Brown* binds the surplus which afterwards came into existence by the sale of the real property upon which the attachments were previously levied. This contention, although a plausible one upon its first statement, is, in our opinion, not sound. The attachment, at least in the second action of *Priest v. Brown*, was levied upon the entire interest of the judgment debtor in the land described in the trust deed. If, as the court below found, that land was originally conveyed to the plaintiff by the judgment debtor

for the purpose of defrauding the creditors of the latter, and the trust deed was accepted by the San Francisco Savings Union without notice of this fact, then the interest remaining in the judgment debtor, subject to attachment and execution by his defrauded creditors, was the entire interest reserved to the fraudulent grantee by the terms of the trust deed, viz., the right to a reconveyance upon payment of the indebtedness secured by the deed; and in case of default in its payment, and a sale of the land in accordance with the terms of the trust deed, a right to the surplus which might come from the proceeds of the sale after satisfaction of the debt secured. This right so reserved constituted an equitable interest in the land, and it was this equitable interest which was attached by the defendant Priest, and, when the land was subsequently sold under the trust deed, the attachment immediately fastened upon the surplus moneys realized by the sale. The right to recover these moneys, in ⁶⁴² the event of a sale of the land by the trustees, was a part of the thing attached in levying upon the entire equitable interest reserved to the fraudulent grantee by the trust deed.

A conveyance by the plaintiff of all his interest in the land attached prior to its sale under the trust deed would have vested in his grantee, without notice of the rights of the creditors of Joseph Brown, the equitable right to such surplus (*Eddy v. Smith*, 18 Wend. 488); and the same right would have passed to a purchaser under an execution sale of plaintiff's interest in the land (*Coats v. Stewart*, 19 Johns. 298); and if the right to recover such surplus would follow a conveyance of the land out of which the surplus arises, and pass under an execution sale of the land itself, it would seem clear that such right would also be subject to the lien of an attachment levied upon the land, or levied upon such an interest therein, as entitles the owner to demand and recover such surplus from the person in whom the legal title may have been vested in trust for purposes of security and sale.

"An equity of redemption in real estate is subject to the lien of a judgment. If before the sale under a decree of foreclosure the judgment is docketed against the defendant, it would be a lien on the surplus proceeds arising from the sale": 2 Freeman on Judgments, 2d ed., sec. 349. And we think it equally true that if before the sale of the equity of redemption, either under a decree of foreclosure or under a power, a valid attachment is levied upon the equity of redemption,

such attachment is a lien upon the surplus proceeds, and they would be subject to be applied upon execution to the satisfaction of a judgment in favor of the attaching creditor in the action in which the attachment is issued. If it were otherwise, the lien of an attachment upon such equity of redemption could be defeated by a sale of the property out of which the equity arises, thus destroying the whole object of the attachment, and rendering it entirely barren of any beneficial results to the plaintiff procuring the issuance of the writ. Our ⁶⁴⁴ conclusion upon this point is that the defendant, Priest, by virtue of the attachment proceedings in *Priest v. Brown*, acquired the right to subject the surplus proceeds arising from the sale of the land attached to the satisfaction of the judgment obtained by him in that action. The attachment of the judgment debtor's interest in the land then standing in the names of his grantee and the trustees named in the trust deed, was in legal effect an attachment of the surplus moneys arising from the subsequent sale.

2. The cause of action stated in the cross-complaint is not barred by either section 343 or subdivision 4 of section 338 of the Code of Civil Procedure. The defendant's cause of action to subject the fund in controversy, or the property from which it was derived, to the payment of the indebtedness due to him from Joseph Brown, did not accrue at the date of the alleged fraudulent conveyance, but only when he obtained a judgment against his debtor upon which an execution would issue in this state. The general rule as to the time when a creditor acquires the right to maintain an action to set aside a fraudulent conveyance made by his debtor, is thus stated at page 522, second edition, of Bump on Fraudulent Conveyances: "No creditor can be said to be delayed, hindered, or defrauded by any conveyance, until some property out of which he has a specific right to be satisfied is withdrawn from his reach by a fraudulent conveyance. Such specific right does not exist until he has bound the property by judgment, or by judgment and execution, as the case may be, and has shown that he is defrauded by the conveyance in consequence of not being able to procure satisfaction of his debt in a due course of law. Then, and then only, he acquires a specific right to be satisfied out of the property conveyed, and shows that he is a creditor, and is delayed, hindered, and defrauded by the conveyance." In accordance with this rule, it has been held in this state that the statute of limitations does not begin to run

against such an action by a creditor until he has ⁶⁴⁵ obtained such a judgment against his debtor, because until then he has no right of action: *Forde v. Exempt Fire Ins. Co.*, 50 Cal. 302; *Ohm v. Superior Court*, 85 Cal. 545; 20 Am. St. Rep. 245.

Nor would the cause of action then accrue if the creditor had not discovered the facts constituting the fraud upon his rights: *Gates v. Andrews*, 37 N. Y. 657; 97 Am. Dec. 764. In construing a statute of the state of New York similar to subdivision 4 of section 338 of the Code of Civil Procedure as applied to an action by a creditor to set aside a fraudulent conveyance of his debtor, the court of appeals of that state in the case last cited say: "It is urged by the counsel for the respondents that the construction of the above clause is that the action shall be deemed as accruing upon the discovery of the fraud by the party aggrieved thereby, whether his right of action is then perfect or not. I think this construction erroneous. The provision is not that the cause shall be deemed to accrue upon such discovery, but to prevent the running of the statute it shall not be deemed to have accrued before such discovery; thereby providing for a class of cases where the right of action was perfect, but became barred by the statute before the discovery of the facts upon which such right depended."

The earliest of the judgments referred to in the cross-complaint, and sought to be enforced against the fund in controversy here, was not obtained until April, 1887, and the cross-complaint in this action was filed in February, 1889, less than two years thereafter. It is true that both judgments mentioned in the cross-complaint are based upon a judgment obtained in Texas by the defendant against plaintiff's grantor in the year 1884, but the existence of this Texas judgment in favor of defendant did not make the defendant, Priest, a judgment creditor in this state within the meaning of the rule which permits only judgment creditors to attack a conveyance made by the judgment debtor to defraud his creditors. The Texas judgment created an obligation in favor of the defendant and against plaintiff's grantor, ⁶⁴⁶ Joseph Brown, but it was an obligation which could not be enforced in this state without suit; and until defendant recovered his judgment upon it here, he occupied only the position of a creditor at large, without any right to subject any specific property of his debtor within this state to the satisfaction of the obligation created by such foreign judgment:

Buchanan v. Marsh, 17 Iowa, 494; *Crim v. Walker*, 79 Mo. 335; *Claflin v. McDermott*, 12 Fed. Rep. 375; *Tarbell v. Griggs*, 3 Paige, 207; 23 Am. Dec. 790.

3. The plaintiff and the intervenor also pleaded in bar of the right of the defendant, Priest, to the relief demanded in the cross-complaint, a judgment of the superior court of the city and county of San Francisco, entered on November 24, 1888, in the action of *Priest v. Brown*, and the said defendant also pleaded the pendency of the same action in abatement of this. In that action the defendant, Priest, was plaintiff, and the other parties hereto were defendants, and it involved substantially the same matters alleged in the cross-complaint, and it was therein adjudged that the conveyance made by Joseph Brown to the plaintiff in October, 1883, was not made with intent to hinder, delay, or defraud the creditors of the former. That judgment was not a bar to the matters alleged in the defendant's answer as a defense, nor to the same matters set out in the cross-complaint, and upon which he demanded the relief given him by the court below. It had not become final when the cross-complaint was filed, nor yet when the action was tried, and the doctrine of *res adjudicata* only applies to final judgments. The time to appeal from the judgment of November 24, 1888, had not expired when the cross-complaint was filed, and, although no appeal had been taken therefrom, the action was still pending within the legal meaning of that term (Code Civ. Proc., sec. 1049), and the judgment was not a bar to a retrial of the matters alleged in the cross-complaint, under the rule announced by this court in *Harris v. Barnhart*, ⁶⁴⁷ 97 Cal. 546; *Naftzger v. Gregg*, 99 Cal. 83; 37 Am. St. Rep. 23; *Estate of Blythe*, 99 Cal. 472.

But while the judgment in *Priest v. Brown* was not for the reason stated a bar to the cause of action alleged in the cross-complaint, still the pendency of that action would have been good ground for the continuance of this until the final determination of the former action, or would have been a sufficient basis for an order dismissing the present action upon motion of the plaintiff, notwithstanding the affirmative relief demanded by the defendant, Priest, in his cross-complaint, and the refusal of the court to have granted either of such motions would, perhaps, have been erroneous; but no such motion was made by the plaintiff, and the trial proceeded without objection, the plaintiff still insisting upon the judgment in *Priest v. Brown* as an estoppel, and as ground for a judgment in his

favor. Under these circumstances we cannot say that the court erred in proceeding to the trial, although it might well have continued the case of its own motion until the final determination of the former action.

4. It is claimed that the findings are not sustained by the evidence. We think, however, the case falls within the rule which does not permit us to disturb the findings of the trial court when there is a substantial conflict in the evidence relating thereto.

We do not deem it necessary to particularly discuss some of the minor points made in the brief of the attorney for the appellant. We have considered them all, and find no error which would justify us in reversing the judgment and order appealed from.

Judgment and order affirmed.

FITZGERALD, J., MCFARLAND, J., HARRISON, J., and GAROUTTE, J., concurred.

Rehearing denied.

FRAUDULENT CONVEYANCES.—TRANSFERS OF PROPERTY NOT SUBJECT TO EXECUTION cannot be fraudulent as to creditors: *Elliot v. Hall*, 2 Idaho, 1142; 35 Am. St. Rep. 285, and note with the cases collected.

RES JUDICATA—RIGHT OF APPEAL.—While the party against whom a judgment has been entered retains the right to appeal therefrom, it cannot be admitted in evidence against him as a bar, under a statute declaring that an action shall be deemed pending from the time of commencement until its final determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied: *Naftzger v. Gregg*, 99 Cal. 83; 37 Am. St. Rep. 23, and extended note, in which the doctrine announced in the California cases is denounced as unsound in principle, and not supported by authority.

JUDGMENT LIENS—WHEN DO NOT ATTACH TO LAND FRAUDULENTLY CONVEYED.—When a debtor conveys his property in fraud of creditors, before the rendition of judgment against him by conveyance valid between the parties to it, such judgment does not create a lien on such property by operation of law: *Davidson v. Burke*, 143 Ill. 139; 36 Am. St. Rep. 367, and note with the cases collected. See also *Blanc v. Paymaster Min. Co.*, 95 Cal. 524; 29 Am. St. Rep. 149.

JUDGMENTS IN PERSONAM AGAINST NONRESIDENTS.—Jurisdiction to render a personal judgment cannot be obtained against a defendant who does not reside and is not within the state and against whom process is not served except by the publication thereof: *Renier v. Hurlbut*, 81 Wis. 24; 29 Am. St. Rep. 850, and note; *Hardy v. Beaty*, 84 Tex. 562; 31 Am. St. Rep. 80, and note.

LIMITATIONS OF ACTIONS—FRAUDULENT CONVEYANCES.—The statute of limitations does not bar an action by the creditor until three years after the judgment establishing his claim: *Ohm v. Superior Court*, 85 Cal. 545; 20 Am. St. Rep. 245.

PEOPLE v. MUNROE.

[100 CALIFORNIA, 664.]

FORGERY.—It is not indispensable to constitute the crime of forgery that the writing, if genuine, be sufficient to form the basis of a legal liability.

FORGERY.—A CONTRACT AGAINST PUBLIC POLICY and therefore illegal and void, may nevertheless be the subject of forgery.

W. E. Cox, W. T. Williams, and Edgerton and Adams, for the appellant.

Attorney General W. H. H. Hart, for the respondent.

665 **GAROUTTE, J.** This case was decided in Department, but a rehearing having been ordered, it is now before the court in Bank. The appellant was convicted of the crime of forgery, and prosecutes this appeal from the judgment and order denying his motion for a new trial. It is insisted that the facts charged in the information do not constitute the offense of forgery, and that is the only matter relied upon for a reversal of the judgment which demands our attention.

We will not enter into a detailed analysis of the various parts of the writing which is the subject of the forgery here charged, but will view it from the standpoint of appellant's claims, and for the purposes of this investigation will concede the writing to be an assignment or sale of the unearned salary of a public school teacher for the next ensuing month, together with an order upon the city auditor of Los Angeles for the warrant representing such salary. That being the fact, it is further claimed that Helen Henry, the purported author of the writing, being a public school teacher, is a public officer, and that the sale or assignment of an unearned salary by a public officer is void, being against public policy; and the writing being void it cannot be the basis of a charge of forgery. The information charged that this writing was forged and passed by the defendant with intent to defraud one J. W. Jackson, the evidence disclosing that the writing was assigned to Jackson for a valuable consideration, and that subsequently the warrant was delivered to him by the auditor, and the money paid thereon by the treasurer.

Section 470 of the Penal Code provides that "every person who, with intent to defraud another, falsely makes, alters, forges, or counterfeits any charter [then follows a list by name of almost every conceivable kind and character of writing] is guilty of forgery." Upon a strict construction it might in

good reason be held that the foregoing definition of forgery curtails the elements ⁶⁶⁶ necessary to be present in order to constitute the offense, as contradistinguished from forgery recognized by various writers upon criminal law. Under our statute we hold burglary to be an entry into a building with intent to commit larceny, and upon the same lines it might be held that forging any writing named in this section, with intent to defraud another, is forgery, and indeed it is apparent that the character of the writing is quite insignificant when placed in the balances opposite the other element—the intent to defraud. But we will take broader ground, and concede the essential ingredients of the crime of forgery to be: 1. A false making of some instrument; 2. A fraudulent intent; 3. If genuine, the writing might injure another. The third element stated is expressly recognized by this court to be the true test as to the nature of the writing: *People v. Frank*, 28 Cal. 514; *People v. Tomlinson*, 35 Cal. 506; *Ex parte Finley*, 66 Cal. 263. There is some general language in the *Tomlinson* case, taken very probably from *People v. Shall*, 9 Cow. 784, to the effect that the writing, if genuine, must be sufficient to form the basis of a legal liability; but such is not the true test, in our opinion. The requirements of the statute demand no such construction, and its adoption would result in the escape from justice of many criminals.

Appellant's counsel has cited many cases to the effect that a contract against public policy is illegal and void, and has no standing in courts. He has also cited cases to the effect that a void contract cannot be the subject of forgery. But he has cited no case to the effect that a contract against public policy is not the subject of forgery, and after diligent examination of authorities we have failed to find a case to that point, and this court is not willing to be the first judicial body to declare such a doctrine. It would serve no useful purpose to review in detail the cases cited by counsel holding that void contracts are not the subject of forgery. Many of them are cases of *nudum pactum*, and others follow the very extreme doctrine laid down in *People v. Shall*, 9 ⁶⁶⁷ Cow. 784, where the learned judge said: "I agree that a man ignorant of the technical requirements of a special agreement might be imposed upon by the paper in question. This remark probably embraces a majority of the community in which we live, and most likely the very parties named in the false instrument. In this view, no doubt, the deed of which the defend-

ant stands convicted involves all the moral guilt of forgery. He believed that he had succeeded in fabricating what purported to be a valid promissory note. But legal forgery cannot be made out without imputing a possible or even actual ignorance of the law to the person intended to be defrauded. However dark may be the moral hue of a transaction, courts of justice can only act upon legal crime—upon criminal breaches of professional obligation.” It is sufficient to say that this language carries the principle to limits which we cannot follow.

The more liberal doctrine, and the doctrine which in the interests of good government should be sustained, is declared in *People v. Krummer*, 4 Parker’s Criminal Reports, 219, where the court says: “We are never called upon to determine whether in legal construction the false instrument or writing is an instrument of a particular name or character. It is a matter of perfect indifference whether it possesses or not the legal requisites of a bill of exchange, or an order for the payment of money, or the delivery of property. The question is whether upon its face it will have the effect to defraud those who may act upon it as genuine, or the person in whose name it is forged. It is not essential that the person in whose name it purports to be made should have the legal capacity to make it, nor that the person to whom it is directed should be bound to act upon it, if genuine, or have a remedy over.”

There is no question but that a writing which is a *nudum pactum* is not the subject of forgery, but a contract which a court will not enforce, or even recognize, because it is against the policy of the law, cannot be termed a *nudum pactum*. A forged contract, even though it covers ~~see~~ a subject matter which makes it void, as against public policy, upon its face may present such an appearance that, if genuine, it might injure another, and such a one satisfies the test which we have laid down. The contract may be such that there would not only be a possibility of its injuring another, but a very strong probability of such injury, for there are many contracts against public policy, which upon their face present a most innocent and most inviting appearance. Even though a contract presented to a court of justice would be declared void as against public policy, still it may have a pecuniary value to its owner. It could have such a value as that the theft of it would be the subject of larceny, and it would be anomalous to hold an instrument the subject of larceny, and

yet its counterfeit not of sufficient value to form the basis of a charge of forgery. If the stealing of the genuine instrument would be larceny, surely the false making of such an instrument would be forgery.

To declare the law to be that all contracts which are not enforceable, because against the policy of the law, are not the subject of forgery, would be offering a *carte blanche* to the professional forger of which he would not be slow to take advantage, and hereafter he would confine himself to the manufacture of spurious paper in the nature of contracts against public policy; for he would thereby be enabled to make a very respectable living—respectable as to the size of his income, and respectable in that such acts would be no crime.

Contracts against public policy cover a multitude of subjects, and in many cases the determination of their character in this regard calls for the exercise of the nicest discrimination from the most learned judges. From the face of the contract itself courts will disagree as to its validity or invalidity. All things which are opposed to moral precepts may be said to be against public policy, and thus we have a great and uncertain field opened up before us. Contracts pertaining to restraint of trade and competition in business have been entered into by parties in the utmost good faith, and ~~and~~ upon considerations of the gravest character; and still those contracts subsequently have been declared to be invalid as against public policy. It cannot be contended for a moment that such contracts could not be forged. Suppose a contract contained a covenant upon the part of a competing dealer that he would not again engage in business within the state of California; thus we have a covenant clearly void under our code as being in restraint of trade, yet we think such a contract is the subject of forgery. Certainly that character of instrument might be well calculated to defraud the tradesman still remaining in business. He might be willing to pay large sums of money for that agreement, well knowing at the time that he could not enforce it in law, but knowing his man and believing the covenants would be considered binding by the party making them, and that no attempt would ever be made to evade them. Such an agreement is of full value until denied. It answers every purpose of its creation until that time, and perchance it may never be denied.

The foregoing principle is fully illustrated in *Commonwealth*

v. Pease, 16 Mass. 91. The defendant was charged with theft bote, defined by Blackstone as where a party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. The offense is here recognized as compounding a felony. The question in that case was: Would a promissory note of the defendant satisfy the term "other amends?" Parker, chief justice, said: "It is argued that it will not, because such a note will be void in law, and in fact nothing may ever be received, but there seems to be no reason for this nice and critical construction of the words. The note, although voidable, is in fact of value to the holder until it is avoided. It may never be disputed."

Obligations *ultra vires* stand upon the same level with contracts against public policy as to the offense of forgery. If one is not the subject of forgery neither is the other. In England corporations are created by special ⁶⁷⁰ act of Parliament. Within those acts are found the measure of their powers. In this country the general statutes, in conjunction with the articles of incorporation which are public records, form the limitation of their powers. Thus the world deals with corporations with a knowledge of the extent of their powers; and ignorance of the law forms no defense to the plea of *ultra vires*. If this appellant's position be sound, all contracts of corporations which are *ultra vires* are not the subject of forgery. Neither would bonds of municipal corporation which are *ultra vires* form the foundation for a prosecution for forgery. The determination of the powers of corporations, both private and municipal, is a question often involving the most complex principles of legal jurisprudence, and, if *ultra vires* contracts may not be forged, a rich field for the successful practice of fraud is presented to the forger.

In *State v. Eades*, 68 Mo. 150, 30 Am. Rep. 780, it is said that the fraudulent making of a false municipal certificate of indebtedness is forgery, though the municipality had no power to issue such certificate, and this principle is in line with sound reason, and fully commends itself to our views. It is held that contracts made under an unconstitutional law are void. Every man is presumed to know the law, and appellant's contention would free the criminal forging such a contract: *Vilhac v. Stockton etc. R. R. Co.*, 53 Cal. 208. In other words, it would be a good defense to a prosecution for forgery that the law under which a genuine contract similar

to the forged one might be made is unconstitutional. Such a plea is too remote from the crime of which the accused stands charged, and his liberty must be regained upon more substantial grounds.

As to what contracts are against public policy, or *ultra vires*, or void as creations under unconstitutional statutes, we think matters entirely foreign to a prosecution for forgery. In the examination of such grave and abstruse questions, the criminal element of the case would soon be lost to view. For the purposes of ⁶⁷¹ the case, we conceded at the outset that this instrument would be declared void by a court, as against public policy, but, if that question was a live issue in the case, this contract possibly might be declared valid, upon the ground that a teacher in the public schools is not a public officer. Certainly the law as to that point is not so plain but that an ordinary layman in the exercise of the greatest care might not be defrauded in taking an assignment of a public school teacher's unearned salary.

There is a further view to be taken of this question, which is also fatal to appellant's claims, and which was incidentally touched upon in noticing the Pease case. Aside from the nonenforceable character of this contract in a court of justice, it has an inherent, substantial value. It is said in Morton's case, 2 East Pleas of the Crown, 955, "that though a compulsory payment by course of law could not have been enforced for want of the proper stamp, yet a man might equally be defrauded by a voluntary payment being lost to him." It cannot be said that a contract has no value because you have no standing in court to enforce it. Who can say in advance that the money will not be voluntarily paid, as agreed upon by its terms? Who can say that Helen Henry would not have lived up to the very letter of this instrument, if it had been her genuine contract? If her word is as good as it should be; if her conduct of the business affairs of life is actuated by those principles of truth and justice which surely should be found in the breast of every teacher in our public schools, then her act and deed, as evidenced by a writing such as is present in this case, would be a valuable instrument to the holder thereof; just as valuable as though it were enforceable in the courts of the land. If a genuine instrument signed by Helen Henry similar to the forged one found in this case possessed such value the conclusion is irresistible that the forged paper was one that might defraud another.

Again, if the paper had been the genuine act of Helen Henry, and upon the strength of her signature ⁶⁷² the proper officer had paid the amount it called for to Jackson, the legal holder thereof, however invalid the writing may have been as against public policy, the money would have been beyond the reach of Helen Henry forever. She could not have recovered it from the officer paying it out, or from Jackson who received it. Her mouth would be closed to assert ownership in herself. The writing would serve as a perpetual barrier to the recognition by courts of any claim upon her part; and, for this reason also, the instrument was of such value as to make it the foundation of a charge of forgery.

It is ordered that the judgment and order be affirmed.

McFARLAND, J., PATERSON, J., and HARRISON, J., concurred.

DE HAVEN, J. I concur in the judgment. The writing alleged to have been forged is one which if genuine would be void, because against public policy, but nevertheless such a writing is, in my opinion, the subject of forgery.

FORGERY.—WHAT MAY BE THE SUBJECT OF: See *People v. Baker*, 100 Cal. 188, *ante*, p. 276, and note, and the extended notes to *Hendricks v. State*, 8 Am. St. Rep. 466, and *Arnold v. Coet*, 22 Am. Dec. 306. To be the subject of forgery it is not necessary that the instrument should have actual legal efficacy: *State v. Johnson*, 26 Iowa, 407, 96 Am. Dec. 158, and note; nor is it always necessary that a writing to be the subject of a forgery should be enforceable: *State v. Dunn*, 23 Or. 562; 37 Am. St. Rep. 704, and note. But the writing must be in such form as to be apparently of some legal efficacy: *State v. Gryder*, 44 La. Ann. 962; 32 Am. St. Rep. 358.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

CHAMBERLAIN v. HEMINGWAY.

[63 CONNECTICUT. 1.]

WATERCOURSES—DEFINITION.—A watercourse is a living stream with definite banks and channel and a mouth distinguishable from its source, not necessarily running all the time, but fed from more permanent sources than mere surface water.

WATERCOURSES—RIPARIAN RIGHTS.—A mere sluiceway or inlet from the ocean into which the sea water runs when the tide rises, and out of which the water flows when the tide falls, is not a watercourse, and the abutting owners on it have no riparian rights. The owner of the land through which it runs may fill it up and convert it into upland.

SUIT to enjoin the filling of a sluiceway. Judgment for defendants, and the plaintiff appealed.

H. G. Newton, for the appellants.

H. Stoddard and S. A. York, Jr., for the appellees.

ANDREWS, C. J. All the questions of law made in this case depend upon a question of fact. In their complaint the plaintiffs say they are the owners of a piece of land adjoining a sluiceway running out of and into Quinnipiac river. In the second count the sluiceway is spoken of as "a river or watercourse."

If the sluiceway so spoken of is a "river," or "a watercourse," so that the owners adjoining it on either side have riparian rights of the same kind and to the same extent that landowners upon the banks of an inland stream possess them, then the contention of the plaintiffs is correct, and there is error in the judgment of the superior court; otherwise there is no error.

From the finding it appears that the Quinnipiac river flows southerly and empties into New Haven harbor. The lower part of the river is a part of that harbor. That part of the city of New Haven which lies on the easterly side of the river at this point is called Fair Haven. On the Fair Haven side the flats spread out originally very wide between the upland and the channel of the river. The highway which has always existed from Fair Haven to New Haven is now known as Grand avenue. About one hundred years ago a bridge was built across the Quinnipiac river as a part of this highway. In building it a causeway was constructed from the upland on the Fair Haven side over the flats to a point where a pier was placed. About twenty feet westerly from that pier another pier was erected. Over the space between these two⁴ piers a bridge was laid. From the second pier the causeway was continued westerly about one hundred feet further, and constructed solid by filling in earth, where a third pier was built. From the third pier the bridge was carried across upon a series of piers to the westerly side of the river. The space so left between the first and second piers afforded a passageway through which the water passed and repassed with the tides. At low tide there was no water at that place. At high tide the water was about six feet deep. The plaintiffs' predecessors in title were the owners of the upland on the north side of the highway. The predecessors in title of the defendants owned the upland on the south side of the highway. These, and other owners north and south of the highway, have from time to time reclaimed the flats lying in front of their respective pieces of upland. In doing so they have conformed to the plan of the causeway and bridge; that is to say, they have each left an open space in the filling, for the water to pass through, at the same place and of the same width as the one left in the causeway. The sluiceway so formed extends north of the highway about two hundred feet, and south of the highway about one hundred and twenty-five feet, is open at both ends to the water of the harbor when the tide runs, and is the "river" or "watercourse" described in the complaint, for the obstruction of which the plaintiffs seek to recover damages. The reclaimed land of the plaintiffs, as well as that of the defendants, with the opening through it as is above stated, had been in substantially the same condition that it was in for more than fifteen years before this suit was brought.

The plaintiffs asked the court to hold that the sluiceway had become a watercourse in which they as riparian proprietors had all the usual rights of riparian proprietors. The court did not so decide. The only reason of appeal which it is necessary to consider is that "the court erred in holding that the premises in question had not become upland and said sluiceway a watercourse, and that the plaintiffs were not entitled to the ordinary rights of a riparian owner in such watercourse."

§ All the waters on the face of the earth may be divided into tide waters and inland waters. It is only to the latter that the term watercourse can be applied. Watercourses are commonly denominated rivers, rivulets, or brooks according to their magnitude. It is only upon watercourses that riparian rights exist. Chancellor Walworth, in *Child v. Starr*, 4 Hill, 375, said that "a watercourse had *ripam*, but not *littus*." So conversely it may be said that the tide water has *littora*, but not *ripas*. Littoral are very different from riparian rights. A watercourse consists of bed, banks, and water. Yet the water need not flow continually; there are many watercourses which are sometimes dry. To maintain the right to a watercourse it must be made to appear that the water usually flows in a certain direction, and by a regular channel with banks and sides: Angell on Watercourses, sec. 4; Gould on Waters, sec. 41. "It may be natural, as where it is made by the natural flow of the water caused by the general superficies of the surrounding land from which the water is collected into one channel; or it may be artificial, as in case of a ditch or other artificial means used to divert water from its natural channel, or to carry it from lowlands from which it will not flow in consequence of the natural formation of the surface of the surrounding land": *Earl v. De Hart*, 12 N. J. Eq. 283, 284; 72 Am. Dec. 395. A watercourse implies a source, a current, and a place of discharge. "A river or stream begins at its source, where it comes to the surface": Angell on Watercourses, sec. 46. "A watercourse is a stream of water usually flowing in a definite channel, having a bed and sides or banks, and usually discharging itself into some other stream or body of water": *Luther v. Winnisimmet Co.*, 9 Cush. 174; *Gillett v. Johnson*, 30 Conn. 180. "A river is a considerable stream of water that has a current of its own, flowing from a higher level, which constitutes its source, to its mouth, where it debouches": *The Garden City*, 26 Fed. Rep. 766. "It is the

moving of the water from the source to the mouth that makes the watercourse": *Challenor v. Thomas*, Yel. 143. "*Fons aquæ, aqua currens, et ostium, est aquæ cursus*. The word 'river' is derived from the * Latin *rivus*. *Rivus est locus per longitudinem depressus, quo aqua decurrat*": Ulpian's Digest, *De Rivis*. And it is used constantly by the Latin authors in a sense that implies a current from a source to a mouth." "*Rivorum a fonte deductio*": Cicero. "*Omnia flumina atque rivos qui ad mare pertinebant*": Cæsar. *State v. Gilmanton*, 9 N. H. 461; 14 N. H. 477. "It is a river or watercourse from the point where the water comes to the surface and begins to flow in a channel, until it mixes with the sea, arm of the sea, lake, or other water. It may sometimes be dry, but, in order to be within the above definition, it must appear that the water usually flows in a particular direction and has a regular channel, with bed, banks, or sides": *Dudden v. Guardians of Clutton Union*, 1 Hurl. & N. 627; Gould on Waters, 41; *Gallup v. Tracy*, 25 Conn. 10, 17; *Stanchfield v. City of Newton*, 142 Mass. 110, 116, and note. "A large stream of water flowing in a channel on land towards the ocean, a lake, or another river; a stream larger than a rivulet or brook": Webster's Dictionary, River. "A large inland stream of water flowing into the sea, a lake, or another river; a stream larger than a brook": Worcester's Dictionary. "A stream flowing in a channel into another river, into the ocean or into a lake or sea": Stormonth's Dictionary. "A large stream of water flowing through a certain portion of the earth's surface and discharging itself into the sea, a lake, marsh, or another river": Imperial Dictionary. "A considerable body of water flowing with a perceptible current in a certain definite course or channel, and usually without cessation during the entire year": Century Dictionary. "A watercourse as defined in the law means a living stream with definite banks and channel, not necessarily running all the time, but fed from more permanent sources than mere surface water": *Jeffers v. Jeffers*, 107 N. Y. 650; *Joliet etc. R. R. Co. v. Healy*, 94 Ill. 416, 421.

We have cited these numerous authorities for the purpose of showing clearly that the sluiceway in question was not and is not a watercourse, as that term is known in the law. If it be granted that the reclaimed land owned by the plaintiffs⁷ may be treated as upland, it does not follow that the sluiceway is a river or any other kind of watercourse. At the most it is like an inlet or ravine in the land, into which the water

of the harbor runs when the tide rises and out of which the water flows when the tide falls. That it is open at both ends so that the water may run clear through in one direction when the tide is rising and in the other direction when the tide falls can make no difference. If by a figurative use of speech this sluice can be said to have banks and a bed, it certainly has no water of its own. The water of the harbor runs into it and runs out again. A man can take as many steps on a treadmill as on a highway, but he cannot perform a journey on it. The treadmill is not a highway. Water may flow into this sluice and flow out again, but it does not therein pursue a course. There is no stream of water passing through it in the sense of a watercourse. There is no current, as the word "current" is applied to a stream of water. It has no source distinguishable from its mouth and it has no mouth distinguishable from its source. It is not a watercourse.

In their brief and in their oral argument the plaintiffs made their claim in another form—that the court erred in holding that they, the plaintiffs, had not the right to have the waters ebb and flow in the sluiceway as they had been accustomed to flow. This is only claiming that the ordinary riparian rights which attach to an inland stream of water ought to apply to the water of the sluice. The plaintiffs say that the waters of the harbor have ebbed and flowed through the sluice for more than fifteen years and that thereby they have obtained the right to have the waters continue to so ebb and flow by adverse use. We are not able to see that any thing has been done or omitted, by the plaintiffs or by the defendants, which was adverse to any right of the other. The plaintiffs have done nothing which they had not a perfect right to do. They have done nothing to which the defendants could have made any legal objections. The plaintiffs and their grantors were the owners of the upland adjacent to the water. They exercised their unquestioned right to reclaim ^s the flats in front of their land by filling them up in such manner as they chose as far out as the channel of the harbor or as far as they desired to do. They did not make the filling continuous, but left a space unfilled into which the tide has ever since caused the water to flow. They owned the land next north of the causeway built as an approach to the Grand avenue bridge. In that causeway there had been left an open space twenty feet wide. The plaintiffs put their unfilled space so that it connected with the open space in the cause-

way. And they have at all times since made such use of their unfilled space as they desired, at no time doing any thing of which the defendants or any other owner could make any legal complaint. The defendants and their grantors owned the upland bordering upon the tide water next south of the causeway. They too exercised their right to reclaim the flats in front of their land by filling them up in such manner as they chose as far out as the channel of the harbor or as far as they desired to do. But they did not make their filling solid and continuous. They left an unfilled space so that it connected on the south with the opening in the causeway, and into which the tides have ever since set the waters of the adjacent river. They have made such use of their open space as they desired, at no time doing any thing they had not the most perfect right to do, and at no time doing any thing of which the plaintiffs or any other owner could have made legal complaint. So that nothing has been done at any time by either of these parties which was adverse to any right of the other. Let this be tested in another way: Suppose the defendants had never filled in their flats further than the east side of the sluiceway, and that they now proposed to continue the filling further west as far as the harbor line, and to make the filling solid, could the plaintiffs cause them to be enjoined? Obviously not, for the defendants would be doing only that which they had the clear right to do: *Prior v. Swartz*, 62 Conn. 132; 36 Am. St. Rep. 333; *Mather v. Chapman*, 40 Conn. 382; 16 Am. Rep. 46:

If the plaintiffs could not successfully resist an obstruction to the sluice in the way supposed, it is certain that they cannot lawfully complain of what the defendants are now doing.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

WATERCOURSES, WHAT ARE: See *Case v. Hoffman*, 84 Wis. 438; 36 Am. St. Rep. 937; *Hawley v. Sheldon*, 64 Vt. 491, 33 Am. St. Rep. 941, and note, and *Simmons v. Winters*, 21 Or. 35; 28 Am. St. Rep. 727, and note with the cases collected.

DEXTER v. EVANS.

[63 CONNECTICUT, 53.]

WILLS—CONSTRUCTION—PRECATORY TRUSTS.—A will by which a testator makes a bequest to his wife in lieu of dower, and then gives her four separate legacies “for her to help as she sees fit” each of four persons named at her decease, the residue of said legacies “to go to W.” who will do by said four persons as he sees fit and see that they are comfortably provided for during their lifetimes “unless my wife sees fit to make a will and dispose of the remainder of these legacies differently, then they go as she wills” followed by a clause giving the wife another legacy to use as she might see fit in caring for C. must be construed as giving to the widow the five legacies as a trustee, and each upon separate trusts until her death with power to expend the legacies in helping the beneficiaries, or to invest them in part and so expend the balance, but before entering upon either of the trusts she must give a bond, and should she decline either trust, the probate court can designate a successor to hold during her life, whose duty it would then be to apply the money for the help of the beneficiaries, as the widow should from time to time direct. In case of the prior death of any one of the four legatees, the residue arising therefrom should be invested and accumulate during the life of the widow, when the whole residue becomes a common fund in the hands of W. for the benefit of the survivors of the four, unless the widow otherwise appoints a trustee by will, under reasonable terms, to carry out the testator’s purpose. If C. survives the widow, a new trustee must be appointed to expend any balance of her legacy according to her needs. If there is any failure by the trustee to exercise an honest discretion in favor of any beneficiary, he or she can obtain relief in the probate court or in equity. The mode of help extended in all cases rests largely in the discretion of the trustee subject to direction by the court. The balance unexpended at the conclusion of the trusts forms part of the testator’s residuary estate.

E. M. Warner and M. A. Shumway, for the defendants.

59 BALDWIN, J. The testator in the will which is the subject of this action, after a bequest to his wife “for her support in lieu of dower,” proceeds as follows:

“I give to my beloved wife, Eliza K. Evans, five hundred dollars, for her to help her sister Catherine White as she sees fit. I also give to my beloved wife five hundred dollars for her to help her sister Rachel Kennedy as she sees fit. I also give Eliza K. Evans, my beloved wife, five hundred dollars for her to help her sister Julia Eddy as she may see fit. I also give Eliza K. Evans, my beloved wife, five hundred dollars for her to help her brother Archibald Kennedy as she may see fit. At the decease of my beloved wife the remainder and residue of the above legacies to go to Walter P. White, who will do by his mother and uncle as he may see fit, and also to see

that Rachel Kennedy and Julia Eddy are comfortably provided for during their ⁶⁰ lifetime, unless Eliza K. Evans, my wife, sees fit to make a will and dispose of the remainder and residue of these legacies differently, then they go as she wills."

Catherine White has died since the testator's decease; Rachel, Julia, and Archibald Kennedy are in advanced years and straitened circumstances.

The will contains some charitable gifts and provisions in favor of several of the nearest relatives of the testator, two of whom are also made residuary legatees, subject to a life estate in his widow, who is appointed executrix. The last bequest, following the residuary clause, reads thus:

"I give, devise, and bequeath to my beloved wife, Eliza K. Evans, five hundred dollars for her to use as she may see fit in caring for Clara M. Evans, now Mrs. Campbell."

The case is reversed for our advice as to the construction and effect of the clauses above quoted.

In each of them, while the widow is the legatee, the expressed purpose is that, through her, another person may be benefited. Her own support was otherwise provided for.

The last of the legacies is given to the widow "for her to use as she may see fit in caring for" Clara M. Campbell. It can, therefore, be used for no other purpose. The time and manner of such expenditures are left to the honest discretion of the widow, but she is a trustee for the use specified, and takes the money, in the language of Lord Eldon in *King v. Denison*, 1 Ves. & B. 263, 272, not subject to a particular purpose, but for a particular purpose: *Loring v. Loring*, 100 Mass. 340, 342. Such a construction has been given by this court to expressions quite similar in *Strong v. Strong*, 8 Conn. 408, 413, and *Bristol v. Austin*, 40 Conn. 438, 442.

The language of the other legacies which provide for assistance to certain relatives of the widow is less decisive of the testator's intention, but we are of opinion that by these also he designed to create a trust estate of the same nature, and has used words sufficient for his purpose. Each legacy is given to the widow "for her to help" the person designated, as (not if) she may see fit. That he contemplated her giving ⁶¹ such help to some extent is evident from the bequest of "the remainder and residue" of the legacies upon her decease. Upon that event, in the absence of any contrary directions in her will, Walter P. White will take any residue which may be unexpended, whether of one or all of these

legacies, as a common fund, in trust to apply it (his mother, Catherine White, having died) for the benefit of his uncle, Archibald Kennedy, and in providing for the comfort of his aunts, Rachel and Julia Kennedy, in such manner and proportions as, in the exercise of an honest discretion, he may from time to time see fit.

The words "who will do by his mother and uncle as he may see fit," while precatory in form, we regard as mandatory in effect. That the testator used them with this intention is apparent from the next clause, which provides that he is "also to see that Rachel Kennedy and Julia Eddy are comfortably provided for during their lifetime." He was to aid his mother and uncle, and "also" his aunts.

The succeeding clause, which qualifies the legacy to Walter P. White by adding "unless Eliza K. Evans, my wife, sees fit to make a will and dispose of the remainder and residue of these legacies differently, then they go as she wills," we think must be limited in effect to the manner of accomplishing the purposes of the trust, and cannot defeat the existence of the trust. The testator had set apart two thousand dollars as a means of helping four of his wife's relatives, and foreseeing that she might not think it judicious to expend the whole during her lifetime, selected her nephew as a proper person to succeed her in the trust. He might, however, reasonably contemplate and provide for her possible preference for some other successor, or her desire that the distribution of the unexpended balance should be continued according to the rule of her own discretion rather than that of any new trustee. The clause under consideration would give her such a power, and should, we think, receive no broader construction.

Should the legacy for the benefit of Mrs. Campbell not be expended during the lifetime of Mrs. Evans, a new trustee should be appointed to apply the balance remaining, from ⁶² time to time in caring for Mrs. Campbell according to her needs: *Birch v. Wade*, 3 Ves. & B. 198, 200.

It is to be presumed that these trusts will be wisely and fairly administered, but should there be any failure to exercise an honest discretion in favor of the respective beneficiaries, they could obtain proper relief either from the court of probate or in an equitable action: *In re Simon's Will*, 55 Conn. 239, 243; *Smith v. Wildman*, 37 Conn. 384; 1 Jarman on Wills, 696.

"If it appear to be the intention of the parties from the

whole instrument creating it that the property conveyed is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust, and impose corresponding duties upon the party receiving the title, if it be capable of lawful enforcement. . . . In the case of *Costabadie v. Costabadie*, 6 Hare, 410, 414, Vice-Chancellor Sir James Wigram said: 'If the gift be subject to the discretion of another person, so long as that person exercises a sound and honest discretion I am not aware of any principle or any authority upon which the court should deprive the party of that discretionary power. Where a proper and honest discretion is exercised, the legatee takes all that the testator gave or intended he should have—that is, so much as in the honest and reasonable exercise of that discretion he is entitled to. That is the measure of the legacy.' But it is always for the court eventually to say, when called upon, whether the discretion has been either exercised at all, or exercised honestly in good faith": *Colton v. Colton*, 127 U. S. 300, 310, 321.

Should Mrs. Evans decline to accept any of the trust, or neglect to give a proper probate bond, another trustee should be appointed by the court of probate, who would apply the funds, during Mrs. Evans' lifetime, to helping the respective beneficiaries according to her discretion from time to time.

63 The superior court is advised that Mrs. Evans takes each of the five legacies in question upon a separate and valid trust; that the first, or so much of it as she did not expend in helping Mrs. White during her lifetime, should be invested and the accumulations added to the principal during the lifetime of the trustee; that Mrs. Evans has full discretion whether to expend the other legacies at once in helping the respective beneficiaries, or to expend them in part, and invest the balance, expending therefrom, in a similar manner, from time to time, as she sees fit; that before entering on either of said trusts she must give a probate bond; that should she decline either trust, the court of probate can designate a successor to hold during her life, who will extend such help to the beneficiary as Mrs. Evans may from time to time direct; that by her will she has power to appoint a trustee of the residue of all or any of the four legacies first given, and to prescribe any reasonable mode of applying the same in helping the beneficiary or beneficiaries entitled under the same; that in default of the execution of this power, Walter P. White will take, upon her death, the unexpended balance of

said four legacies, as one common fund, in trust to apply the same for the benefit of his uncle and in providing for the comfort of his aunts, who are named in connection therewith, at his discretion; that should Mrs. Campbell survive Mrs. Evans, and any balance of the last bequest of five hundred dollars then remain unexpended, a new trustee should be appointed to expend it in caring for Mrs. Campbell according to her needs; that any beneficiary would have a right to relief either by an equitable action or in the probate court, in case of a failure on the part of the trustee to extend any necessary assistance to him, but that in determining such necessity the discretion of Mrs. Evans, or in case of his acting as trustee in default of another appointment by her, of Walter P. White, would control, provided it were exercised honestly and in good faith; and that any balance of any of these five legacies, not expended as hereinbefore mentioned, is part of the residuary estate of the testator.

In this opinion the other judges concurred.

TRUSTS—PRECATORY.—WHEN ARISE: See *Murphy v. Carlin*, 113 Mo. 112; 35 Am. St. Rep. 699, and note with the cases collected.

TRUSTS.—EFFECT OF DEATH OF BENEFICIARY: See *Matter of Smith*, 131 N. Y. 239; 27 Am. St. Rep. 586, and note.

TRUSTS.—THE COURT HAS POWER TO APPOINT A NEW TRUSTEE upon the death of the trustee, though no notice is given to the trustor or his successor: *Dyer v. Leach*, 91 Cal. 191; 25 Am. St. Rep. 171, and note. In case of the incompetency, inability, or refusal of a trustee to accept a trust, a court of competent jurisdiction may substitute a new trustee to enforce the trust and carry out its provisions: *Smith v. Davis*, 90 Cal. 25; 25 Am. St. Rep. 92, and note.

SKELLY v. BRISTOL SAVINGS BANK.

[68 CONNECTICUT, 82.]

INTEREST—RIGHT TO RECOVER UNEARNED INTEREST PAID IN ADVANCE.—

No part of the interest paid in advance on a note according to its terms can be recovered upon a voluntary payment of the principal, during the time for which the interest has been paid, in the absence of a promise by the payee to return unearned interest in case of such payment, or of a reservation of the right to bring suit within the time for which interest has been paid.

INTEREST—PAYMENT OF IN ADVANCE—FORBEARANCE TO SUE.—The taking of interest in advance on a note is, in the absence of any agreement to the contrary, *prima facie* evidence of an agreement to forbear collection of the note during the period for which interest has been paid.

C. E. Perkins and E. Peck, for the appellant.

N. E. Pierce, for the appellees.

88 ANDREWS, C. J. The complaint alleges that on January 1, 1892, the plaintiffs were indebted to the defendant in the sum of ten thousand dollars, as evidenced by their promissory note as follows:

"\$10,000.

January 14, 1888.

"On demand for value received we promise to pay the Bristol Savings Bank, at the office of said bank, ten thousand dollars, with interest payable in advance semi-annually on the first days of January and July in each year."

[Signed by the plaintiffs.]

That on said January 1, 1892, the plaintiffs paid the defendant \$250, as interest in advance at the rate of five per cent per annum, that being the rate of interest agreed upon between the parties. That on April 7, 1892, the plaintiffs gave the defendant a draft for the sum of \$10,000 in payment of the note, and demanded the repayment of the unearned interest, and that the defendant accepted the same in payment of the note. That the defendant paid the plaintiffs \$75, and refused to pay any more. That the plaintiffs on that day, and on divers days between that time and the date of the writ, demanded the balance of the unearned interest; and that the amount of the unearned interest on said April 7th was \$115.13, and that the balance still due the plaintiffs and unpaid is \$40.13.

To this complaint the defendant demurred, and for reasons of demurrer assigned the following:

"That the said complaint purports to be a complaint in contract, but no contract either express or implied is set out therein, nor are any facts alleged from which the law implies a contract."

The trial court overruled the demurrer and rendered judgment for the plaintiffs. The defendant appeals to this court.

In considering the sufficiency of the complaint, the payment of \$75 by the defendant to the plaintiffs may be laid out of the case. It is agreed that the defendant refused to repay any thing as unearned interest, but treated the plaintiffs as depositors of the sum of \$10,000, and allowed them interest on that sum from the first day of May to the first day of July at the same rate (that is, four and one half per cent) which is allowed other depositors. It must also be admitted, as it is,

that the complaint does not describe one of ⁸⁷ that sort of transactions to which the law attaches the obligations of a contract irrespective of the intention of the parties, or even against that intention; as where goods have been illegally taken from the owner and sold, when he may waive the tort and sue in *assumpsit*; or where a husband has turned his wife out of doors, and a neighbor has supplied her with necessities, when the neighbor may bring *assumpsit* against the husband.

A contract is an agreement between parties whereby one of them acquires a right to an act by the other; and the other assumes an obligation to perform that act. The obligation so assumed is called a promise. Contracts may be express or implied. These terms, however, do not denote different kinds of contracts, but have reference to the evidence by which the agreement between the parties is shown. If the agreement is shown by the direct words of the parties, spoken or written, the contract is said to be an express one. But if such agreement can only be shown by the acts and conduct of the parties, interpreted in the light of the subject matter and of the surrounding circumstances, then the contract is an implied one. The plaintiffs' complaint does not allege any direct words of promise by the defendant to repay unearned interest. The question then is—Do the acts and conduct of the parties show such a promise?

The argument of the plaintiffs is this: As their note is payable on demand the bank had the unqualified right to demand payment or to bring a suit on it at any time, notwithstanding the interest had been paid in advance; that the bank might have brought a suit on the seventh day of April, and if it had done so it would have been required to account for the interest which had been paid but not earned at that time, either to repay it or to apply it as part payment of the principal; and they say that their right to pay the note at any time is precisely the same as the right of the bank to demand payment, and that the same results follow, namely, that the bank must repay the unearned interest.

There can be no doubt that a savings bank might take interest in advance on a loan made by it and reserve the right ⁸⁸ by agreement to bring a suit within the time for which interest had been paid. It was so decided in *Crosby v. Wyatt*, 10 N. H. 318. Such seems to have been the understanding in our own cases: *Hubbard v. Callahan*, 42 Conn. 524; 19 Am.

Rep. 564; *Hayes v. Werner*, 45 Conn. 246, 252. In such a case if the note was collected by a suit it might be said that a promise was implied to return any excess of interest that had been paid, because the bank would thereby deprive the maker of the note of the use of the money a part of the time for which its use had been paid. So too there might be a promise by the bank to return unearned interest if the note should be paid by its maker. In the case before us there is no such promise unless it is found in the facts stated in the complaint.

The payment by the plaintiffs of the \$250 on the first day of January, 1892, a part of which it is sought to get back by this action was in terms the payment of interest in advance. It is so averred in the complaint. It was an absolute payment, not a conditional one. The plaintiffs by their note made two years before had promised in writing for value received to make payment of the interest from six months to six months in advance. They had done so for two years. The payment on the 1st of January, 1892, was made in pursuance of that promise. At the time that payment was made neither the plaintiffs nor the defendant expected or desired that any part of it should ever be paid back. The defendant is a savings bank engaged in the business of loaning money. It must obtain interest on its loans that it may be able to pay interest to its depositors. It is an advantage to such a bank to have permanent loans. It is a matter of common knowledge that a savings bank rarely, if ever, collects a loan when secured and the interest is paid. To have a loan paid is to such a bank an inconvenience and a loss. It must be assumed that the plaintiffs understood this usage of the defendant. On the seventh day of April, 1892, the defendant was willing and desirous that the loan to the plaintiffs should remain. The plaintiffs, disregarding the wish of the defendant, insisted on making payment. It is presumable that the plaintiffs paid their note on that day because they expected to secure an advantage to themselves by doing so. Their plan involved an advantage to themselves by imposing a loss on the defendant.

These are not circumstances from which a promise by the defendant to repay any portion of the interest money can be implied. Implied promises grow out of the acts of parties when those acts translated into words are a promise. In such cases the parties are supposed to have made those stip-

ulations which as honest, fair, and just men they ought to have made. But these qualities never require a party to submit to a loss for the benefit of another. The argument of the plaintiffs assumes that there was no contract by the defendant for forbearance. If this assumption is not correct then their argument falls. Now it seems to us that the taking of interest in advance is a fact, in the absence of any contrary evidence tending to show an agreement for forbearance. This precise question was fully and carefully considered by Parker, C. J., in *Crosby v. Wyatt*, 10 N. H. 322. He said: "Where an individual pays interest upon a note in advance, he does so for the purpose of procuring delay; and it is believed that it is generally understood between the parties, unless there is some express reservation, that the creditor has no right to call for the principal until the expiration of the time. The payment of the interest is the consideration of such an agreement implied from the transaction itself, if not distinctly expressed. The sum received is a payment, not as a part of the principal or generally, but specially as interest for a certain period. And why is this payment made? Clearly to obtain delay, and for nothing else. The very idea of a payment of interest in advance presupposes that delay of payment of the principal is to be given for the same. The interest thus paid is not expected to be applied afterwards to the principal, or paid back on any contingency, unless there is some agreement of the parties to that effect. Nor are we aware of any principle upon which the maker, after such a payment of interest in advance, could, before the expiration of the time, on offering to pay the balance, require the creditor to apply any portion of the interest so paid in discharge of the principal. ●● Should the creditor within the time commence a suit and obtain a judgment, no defense being made, the maker might perhaps recover back the interest for the unexpired time; but that would be because the creditor had not performed what was incumbent on him, and the consideration of the payment had failed to that extent: *Fuller v. Little*, 7 N. H. 535. A payment of interest in advance furnishes a sufficient consideration for a contract to delay: *Wheat v. Kendall*, 6 N. H. 504, 508. As a general rule, then, the reception of interest in advance upon a note is *prima facie* evidence of a binding contract to forbear and delay the time of payment; and no suit can be commenced against the maker during the

period for which the interest has thus been paid." These views were affirmed by the same court in *Drew v. Towle*, 30 N. H. 531; 64 Am. Dec. 309; and approved in *People's Bank v. Pearsons*, 30 Vt. 714. Other cases in various jurisdictions sustain the same doctrine: *Wakefield Bank v. Truesdell*, 55 Barb. 602; *Robinson v. Miller*, 2 Bush, 179; *Preston v. Henning*, 6 Bush, 556; *Scott v. Saffold*, 37 Ga. 384; *Miles v. M'Lellan*, 2 Nott & McC. 133; *Gardner v. Gardner*, 23 S. C. 593; *Jarvis v. Hyatt*, 43 Ind. 163; *Abel v. Alexander*, 45 Ind. 523; 15 Am. Rep. 270; *Woodburn v. Carter*, 50 Ind. 876.

The cases from Massachusetts and Maine hold that the reception of interest in advance is not of itself evidence of such a binding contract to extend the time of payment as to discharge a surety: *Oxford Bank v. Lewis*, 8 Pick. 458; *Blackstone Bank v. Hill*, 10 Pick. 129; *Agricultural Bank v. Bishop*, 6 Gray, 317; *Crosby v. Wyatt*, 23 Me. 156. But these cases, when examined with care, are not inconsistent with the cases from New Hampshire and Vermont. In *Oxford Bank v. Lewis*, 8 Pick. 458, it is stated that the bank, even though it had taken interest in advance, had retained the right to sue at any time. In *Blackstone Bank v. Hill*, 10 Pick. 129, the statement is that the payments of interest in advance were made with the understanding that if the bank should want money the note might be collected before the expiration of the time for which the interest had been paid. These two cases are the authority for all later cases in that state and in Maine. In the very ⁹¹ latest case from Massachusetts—*Haydenville Savings Bank v. Parsons*, 138 Mass. 53—the court holds upon the facts stated that the bank reserved the right to sue at any time on the note. With the reservation of the right to collect the note at any time these cases harmonize with all the other cases cited.

After an examination of all the cases we are of opinion, upon principle as well as upon authority, that the taking of interest in advance on a note is, in the absence of any contrary agreement, *prima facie* evidence of an agreement to forbear collecting the note.

There is error, and the judgment is reversed.

In this opinion the other judges concurred.

WOODRUFF v. MARSH.

[68 CONNECTICUT, 125.]

WILLS—CONSTRUCTION—CHARITABLE BEQUEST.—A will in which the testator, after expressing a desire that a large part of his estate shall be “used in the improvement of mankind by affording such assistance and means of educating the young as will help them to become good citizens,” gives to sixteen trustees a tract of land, with four hundred thousand dollars in trust for the purpose of maintaining a home for destitute and friendless children on the premises, “to be known as the William L. Gilbert Home, to be under the care and control of the above-named trustees,” who shall have power to fill all vacancies, states the charitable purpose for which the bequest is given with sufficient definiteness, and sufficiently describes the class to be benefited. The “care and control” given to the trustee is not limited to the fund, but includes the institution, and the power to select the individuals who are to receive the benefit. The “assistance” to be given to “destitute and friendless” children under the bequest is to supply them with what other children, not destitute and friendless, find at their homes, and includes food, shelter, clothing, and medical attendance. The “education” referred to may be afforded either by instruction given at the “Home,” or by allowing some, or all, of the children to attend school in the vicinity, at the discretion of the trustees.

WILLS—CONSTRUCTION OF CHARITABLE BEQUEST.—A bequest in a will, by which a testator leaves his residuary estate to trustees “in trust for the establishment and maintenance of an institution of learning, to be known as the Gilbert School,” provided certain lands and buildings shall be “given free of cost for the location of said school, excepting that the present owners of said land may reserve the use and income from the hotel building and barn located thereon for the period of twenty years from the date of their purchase of said land,” is not obnoxious to the statute against perpetuities, as it clearly appears that it was the intent of the testator that the site for the school should be conveyed to the trustees within twenty years from such purchase, and the conveyance of such site is not a condition precedent to the taking effect of the bequest, as in equity it vests at once upon the death of the testator in the class of beneficiaries, who are ultimately to profit by it, liable to be divested by the subsequent failure to acquire the site within such twenty years.

WILLS—CONSTRUCTION—CHARITABLE TRUSTS.—When two valid charitable trusts are created by will, and the testator bequeathes to the trustees of each the sum of four hundred thousand dollars for the establishment and maintenance of such trusts, a further provision in the will relating to such bequests that “the said four hundred thousand dollars to be kept safely invested, and from the yearly income thereof the sum of ten thousand dollars shall each year be added to the principal of said fund for the period of one hundred years, and longer if the trustees deem it best,” is reasonable and valid. Should the trustees continue the accumulations after a hundred years for an unreasonable time, the courts can interpose a proper remedy.

WILLS—CONSTRUCTION—CHARITABLE BEQUEST.—In considering the proper constructions of provisions of a will creating a charitable trust, it is

allowable to transpose words or limitations, when warranted by the immediate context or general scheme of the will.

WILLS—CONSTRUCTION—CHARITABLE BEQUESTS.—If two modes of construction are fairly open, one of which turns a charitable bequest in a will into an illegal perpetuity, while the other makes it valid and operative, the latter construction must be adopted.

GIFTS TO CHARITABLE USES ARE HIGHLY FAVORED and liberally construed to accomplish the intent of the donor. Trusts for such purposes may be established and carried into effect, when, if not of a charitable nature, they could not be supported.

RESULTING TRUSTS, WHICH CAN BE REBUTTED BY EXTRINSIC EVIDENCE, are those claimed upon a mere implication of law, and not those arising from the failure of an express trust for imperfection or illegality.

C. E. Perkins and S. A. Herman, for the plaintiffs.

C. E. Gross, for the defendants.

126 BALDWIN, J. This is a suit by the executors of the will of William L. Gilbert, of Winchester, for a construction of certain of its provisions. The will commences by a declaration that its dispositions are the result of a desire on the part of the testator that a large part of his estate should be “used in the improvement of mankind, by affording such **127** assistance and means of educating the young as will help them to become good citizens.” After certain legacies to his next of kin, and for educational and religious purposes, come the clauses as to which the advice of the court is sought. By the first of these he gives and devises to sixteen of his fellow-townsmen, “in trust for the purpose hereinafter named,” a tract of land in Winchester described as that “deeded to me by Henry Gay, together with all the buildings located thereon, and all the land which I may hereafter acquire adjoining the above-described tract,” the will then proceeding as follows: “and also the sum of four hundred thousand dollars, for the purpose of maintaining and supporting a home for destitute and friendless children, permanently, on the above-described premises, and to be known as the ‘William L. Gilbert Home’; the same to be under the care and control of the above-named persons as trustees, and said trustees shall have the power to fill all vacancies which may occur by death or otherwise; the whole number to always consist of sixteen, eight of whom shall be residents of the Fourth School District of Winchester, and the other eight shall be residents of the First School District of Winchester, as they are now divided; the said four hundred thousand dollars to be kept safely invested, and from the yearly income thereof the sum of ten thousand dollars

shall each year be added to the principal of said fund for the period of one hundred years, and longer if the trustees deem it best. The balance of the income from said fund, including the income from said yearly additions, may be used for the maintenance of said home. And said trustees shall have the privilege of vesting said fund in mortgages secured on real estate located in this and other states within the United States; and also in the purchase of real estate and the erection of buildings thereon, as they may deem best, for the safety and increase of said fund."

The heirs at law contend that this devise and bequest is void for indefiniteness, uncertainty, and the absence of any grant of power to select the beneficiaries.

In devises and bequests of this nature our law requires ¹²⁸ either certainty in the particular persons to be benefited, or certainty as to the class of persons to be benefited, with an ascertained mode of selecting them out of such class. The testator, in the present case, describes the persons whom he intends to benefit as "destitute and friendless children"; the mode of benefit to be "maintaining and supporting a home" for them "permanently," at a place particularly specified, to be known as the "William L. Gilbert Home," the same to be under the care and control of the trustees whom he has selected, and their successors in the trust; and declares the great object of his will to be the affording of "such assistance and means of educating the young as will help them to become good citizens." We think that the trustees who are to maintain and support this home, and under whose care and control it is expressly placed, are thereby invested with ample powers to select for its inmates, from time to time, subject only to the limitations imposed in the concluding portion of the will, such individuals of the class of destitute and friendless children as they, or a majority of them, may think proper, or to commit the power of selection to suitable officers or agents under their supervision.

This power to admit includes power to exclude, and to remove after admission. All such acts are naturally incident to the control of the institution.

It is claimed by the heirs at law that the words, "the same to be under the care and control of the above-named persons as trustees," refer not to the "William L. Gilbert Home," but to the funds bequeathed. Such a construction would do violence to the rule which refers an adjective or relative

clause to its last antecedent, as well as to the natural course of thought which runs through the whole paragraph, the latter part of which contains specific directions as to the management of the fund and the use of the income it may produce.

The charitable purpose is sufficiently definite. The children to be benefited must reside in the "Home": *Coit v. Comstock*, 51 Conn. 852, 382; 50 Am. Rep. 29. They can reside there, at most, only so long as they are children. They must be taken ¹²⁹ from the class of the destitute and friendless, and they should be given such assistance and means of education as will help them to become good citizens. The "assistance" should be such as children, who are not destitute and friendless, find at their homes, and may thus include food, shelter, clothing, and medical attendance. The means of education may be afforded either by instruction given at the home, or by allowing some or all of the children to attend school in the vicinity, at the discretion of the trustees.

The class to be benefited is a large one, for the testator has imposed no restrictions as to race or residence, but the number of possible beneficiaries under a charitable bequest is immaterial where a power of selection is given: *Treat's Appeal From Probate*, 30 Conn. 113. The "assistance" to be furnished is quite as definitely indicated as was that in the bequest which we upheld in *Tappan's Appeal From Probate*, 52 Conn. 412, for the charitable assistance and benefit of indigent, unmarried, Protestant females over the age of eighteen years, residents of Bridgeport.

In 1887, about three years before the date of the will, a special charter was granted to the same sixteen persons who are constituted trustees under this bequest, by the name of "The William L. Gilbert Home": 10 Special Acts, 632. By this charter they were authorized to erect and forever maintain a home in Winchester for destitute minors, admittance to which should at all times be under the control of the corporators, who could make such rules for their admission as should be deemed wise and best. The corporation was empowered to receive and hold any property which might be conveyed or bequeathed to it by William L. Gilbert, and in administering its trust to comply with any lawful regulations which he might prescribe. The heirs at law of Mr. Gilbert have argued before us that, as he did not make any bequest to this corporation, it may fairly be presumed that he did not

like the discretionary powers as to the admission of minors to the home which this charter gave, and that as he afterwards used different language in respect to this matter in his will, such language ought to be construed as not intended ¹³⁰ to confer similar authority. Their contention, in other words, is that the charter rebuts any implication of a grant by the will of discretionary powers in the selection of beneficiaries. It is claimed, on the other hand, by the trustees, that the devise and bequest in question inure to them, not as individuals, but as a corporation, and should be construed as if expressly made to "The William L. Gilbert Home."

We find ourselves unable to accept either of these views. The trustees, by the plain terms of the will, take as natural persons, and it gives them, though in fewer words, substantially the same powers of selection and administration which are contained in the charter.

The testator left his residuary estate to the same sixteen persons, in trust "for the establishment and maintenance of an institution of learning to be known as the 'Gilbert School,'" providing certain lands and building in Winchester, which he particularly describes, should be "given, free of cost, for the location of said school, excepting that the present owners of said land may reserve the use and income from the hotel building and barn located thereon for the period of twenty years from the date of their purchase of said land, the repairs and taxes to be paid by them so long as they shall receive the income of said hotel and barn." The will then proceeds as follows:

"In case the necessary school-buildings are not erected and paid for during my lifetime, then the amount necessary for the erection of said buildings may be taken from the principal of the aforesaid residue. Also, upon the grounds of said Gilbert School shall be provided suitable rooms for a public library for the use of said school, and which shall also be free to the inhabitants of said town of Winchester.

"The balance of said residue of my estate shall be safely invested by my said trustees, who shall have the same privileges as to investing the fund in mortgages secured on real estate in this and other states, and in purchasing real estate and erecting buildings thereon as is given in the preceding section relating to the 'William L. Gilbert Home.' And from the yearly income thereof the sum of ten thousand dollars ¹³¹ shall be added each year to the principal for the period

of one hundred years, and longer, if the trustees deem best. The balance of the income from said fund, including the income from said yearly additions, may be used for the maintenance of said Gilbert School and the free library above mentioned.

"It is my will that the trustees of the said 'William L. Gilbert Home' and of the said 'Gilbert School' shall be composed of men of the Protestant faith, and that the management of said institutions shall be of a nonsectarian character. Also it is my will that no children who have been educated in a Catholic parochial school shall be admitted to said 'Gilbert School.' And, further, it is my will that no teacher, scholar, or inmate shall, under any condition, be admitted or receive the benefit of either of said institutions, who shall use tobacco in any form or spirituous liquors as a beverage."

Similar objections to those already considered are urged against the validity of this bequest, and also one founded on the law against perpetuities. Our statute of charitable uses (Gen. Stats., sec. 2951) specially names among the grants to be protected, such as may be made for the maintenance of "schools of learning." The testator, in following the words of the law, has sufficiently expressed the great object he had in view, and he has wisely imposed no limitations upon the nature of the instruction to be given, except that furnished at the beginning of the will by the expression of his general intent to provide such "means of educating the young as will help them to become good citizens": *Coit v. Comstock*, 51 Conn. 352, 379; 50 Am. Rep. 29. The union of school and library is fully in accord with the policy of the state, as well as with all rules of education: Gen. Stats., sec. 2155.

The character and extent of the buildings to be erected, the admission of scholars, the regulation of studies, the employment of instructors, and the selection of books for the library, have been all committed to the good judgment of the trustees by the terms of the trust, subject only to the express limitations which these impose: *New Haven Young Men's Institute v. City of New Haven*, 60 Conn. 32, 40, 41; *Dodge v. Williams*, 46 Wis. 70.

The objection that the bequest is void as tending to create a perpetuity is founded on the claim that it may not vest during the life of a person in being at the death of the testator, and the children of such person (Gen. Stats., sec. 2952), or the period of twenty-one years after his decease.

It is certain that the school and library can be built only on the designated site, and that this site was not the property of the testator, or, so far as the will discloses, subject to his control. It is certain also that the trust funds can be used for no other purpose than the establishment and maintenance of such a school and library, and that the fact that the trustees are persons in being and receive an immediate estate will not save the bequest, if there is no certainty that effect can be given to the testator's charitable intent.

In the case of *Jocelyn v. Nott*, 44 Conn. 55, 59, which is relied on by the heirs at law, the devise held void was one made to trustees, of two adjacent parcels of land, to hold until a congregational society of sufficient ability should desire to build a church upon one of them, and then to permit such church to be built, and afterwards to convey both parcels to the society, the second (upon which was a house), to be thereafter used as its parsonage, but until such conveyance, to be occupied by certain individuals who were named, if they desired, rent free, for their own benefit; the provision as to one of these being for an occupancy by him "for himself and his family." There was no certainty that any congregational society would offer to build such a church as was thus contemplated within the lives of these persons and of their children, or within twenty-one years from their decease, and meanwhile a beneficial estate in favor of private individuals would continue in existence, which, if the provision for the family of one of the beneficiaries were construed to include those of his household who might survive him, might render the land inalienable for a period beyond the limits prescribed by law: *Odell v. Odell*, 10 Allen, 1, 7. Viewed in this aspect, the result reached in *Jocelyn v. Nott*, 44 Conn. 55, is not inconsistent with the rule as stated in *Russell v. Allen*, 107 U. S. 163, 171, that "a gift in trust for a charity not existing at the date of the gift, and the beginning of whose existence is uncertain, or which is to take effect upon a contingency that may possibly not happen within a life or lives in being and twenty-one years afterwards, is valid, provided there is no gift of the property meanwhile to or for the benefit of any private corporation or person." This language was quoted with approval by this court in *Storrs Agricultural School v. Whitney*, 54 Conn. 342, 348, and is a clear and accurate statement of the bearing of the statute of perpetuities upon charitable bequests.

In the will now under consideration the residuary estate is wholly devoted to charitable uses, and no postponement of the establishment of the school can inure to the profit of any private interest. We do not think, however, that a postponement is possible beyond the time allowed for the vesting of any legal estate. The trustees are to establish the school, provided a certain site for it is given free of cost, "excepting that the present owners of said land may reserve the use and income from the hotel building and barn located thereon for the period of twenty years from the date of their purchase of said land, the repairs and taxes to be paid by them so long as they shall receive the income of said hotel and barn." In considering the proper construction of such provisions, it is allowable to transpose words or limitations, where warranted by the immediate context or the general scheme of the will: Jarman's 19th rule. Had the wording of the condition been that the building site should be given free of cost within twenty years from the date when the present owners purchased it, excepting that they might reserve the profits of the hotel and barn until the expiration of that time, there would be nothing in the bequest savoring of perpetuity. We think that the testator intended to require a conveyance of the land within the period of twenty years from its purchase by those whom he describes as its present owners. Should a conveyance be first tendered after the twenty years, the trustees would not be bound to ¹³⁴ accept it, since the delay would have given the grantors the profits of the hotel and barn for a longer time than that allowed by the will, thus lessening the value of the gift which he seems to have regarded as in effect a consideration for his bequest.

Had there been no reference to such a period of twenty years, the bequest could have been upheld on the same principle by which that to the Smith Memorial Home in New London was recently supported: *Coit v. Comstock*, 51 Conn. 352, 383, 384; 50 Am. Rep. 29. It would then have been fairly implied from the general scheme of the will that the gift of the land, which was the consideration of the proposed foundation, must be made within a reasonable time, and that it would be so made would have been almost a necessary presumption in case of so large an endowment for important public objects, the benefit of which would extend to every inhabitant of the town forever. A court of equity regards such a charity as vested in interest at the testator's decease

in the class of beneficiaries who are to ultimately profit by it, though liable to be subsequently divested in case of a failure to perform the prescribed condition.

The testator did not make the gift of a building site a condition precedent to the taking effect of his residuary bequest. The bequest to the trustees is immediate and unconditional; and their duty to add to it by annual accumulation dates by relation from the day of the testator's death: *Lawrence v. Security Co.*, 56 Conn. 423, 439. Should the land not be given within a reasonable time, the intended purpose of the trust might fail, but it would be by the nonperformance of a condition subsequent: *Tappan's Appeal from Probate*, 52 Conn. 412, 419; *Literary Fund v. Dawson*, 1 Rob. (Va.) 402, 421.

A bequest quite similar to that now under consideration was the subject of construction in *Chamberlayne v. Brockett*, L. R. 8 Ch. App. 206, 210. It was made to trustees to invest the fund and apply a part of the income to certain charitable purposes, and "when and so soon as land shall at any time be given for the purpose," in certain specified ¹²⁵ parishes, to build three almshouses thereon, and apply any surplus towards the support of their inmates. If this language were to be taken as meaning that the charitable trust could take effect only on condition that the land should be given on which to build, the provision would have been objectionable as tending to create a perpetuity and contrary to the English statute of mortmain (9 Geo. II, c. 30), affecting deeds or devises to charitable uses, since, if carried out, it would have thrown this land into mortmain as effectually as if it had been owned and devised by the testatrix. The bequest was upheld, Lord Chancellor Selborne saying that the only real question was whether the charitable trust was constituted immediately upon the death of the testatrix or was made conditional upon the gift of land at an indefinite future time for the erection of almshouses thereon. The court was of opinion that the gift was immediate, and therefore valid, "although the particular application of the fund directed by, the will would not of necessity take effect within any assignable limit of time, and could never take effect at all except on the occurrence of events in their nature contingent and uncertain": See, also, *Henshaw v. Atkinson*, 3 Madd. 806, 813.

Under the *cy pres* doctrine of the jurisprudence of England,

a failure of the contemplated gift of land in such cases simply leaves the trust fund applicable, under the direction of the courts, to some other form of charity. For more than a century after the foundation of the colony of Connecticut equitable relief was given only on petition to the general assembly. In 1773 a grant of concurrent jurisdiction was made to the ordinary courts of justice, but the legislature continued the occasional exercise of chancery powers down to a recent period: 2 Swift's System, 420; *Stanley v. Colt*, 5 Wall. 119. Among these was that of administering *cy pres* relief in matters of charitable trusts: *Wheeler's Appeal from Probate*, 45 Conn. 306, 315. In 1876 the general assembly confided to the superior court power to order the sale of any lands devised in trust where, in its opinion, this would promote the interest of the beneficiaries: Gen. Stats. ¹²⁶ sec. 779. In 1880 it was given authority, in cases where the execution of a trust deed in accordance with its terms has become, by reason of a change of circumstances, impossible, or would frustrate the manifest intention of the grantor, to sell the land, and direct the application of the proceeds in such manner as it may deem most proper to secure the object for which the trust was originally created, as near as may be according to the intent of the conveyance: Gen. Stats., sec. 778. In 1886 the superior court was invested with exclusive jurisdiction of all matters where the general assembly had theretofore exercised jurisdiction over the sale of lands, when, by reason of the condition of the parties in interest, or the limitations of any will or deed, no person could convey a legal title: Gen. Stats., sec. 776.

Whether, in view of the gradual and, of late, rapid withdrawal of the general assembly from the consideration of matters proper for equitable relief, the equitable jurisdiction of the superior court, which has been thus expressly authorized to apply the *cy pres* doctrine to trusts created by deed, ought not to be now deemed to include authority to deal in the same manner with charitable trusts created by will, it is unnecessary to determine in the present case: See *Birchard v. Scott*, 39 Conn. 63; *Dailey v. City of New Haven*, 60 Conn. 314, 325. The bequests of Mr. Gilbert need only that favorable construction to which all charitable trusts are entitled in a court of equity, to ascertain their meaning and establish their validity. It will certainly not be presumed that the testator intended to make any disposition of his estate in vio-

lation of law. If two modes of construction are fairly open, one of which would turn his bequest into an illegal perpetuity, while, by following the other it would be valid and operative, the latter mode must be preferred: Gray on Perpetuities, sec. 633.

It is now fully recognized as a rule of our jurisprudence that gifts to charitable uses are to be highly favored, and will be most liberally construed in order to accomplish the intent of the donor, and trusts for such purposes may be established and carried into effect where, if not of a charitable ¹³⁷ nature, they could not be supported: *Coit v. Comstock*, 51 Conn. 352, 377; 50 Am. Rep. 29.

Expressions not fully in harmony with this doctrine may be found in some of the earlier American decisions, of which the leading one is *Baptist Assn. v. Hart*, 4 Wheat. 1, cited and relied on in *White v. Fisk*, 22 Conn. 31, 52, 54. But the position there favored by Chief Justice Marshall, that, independently of the statute of 43d Eliz., courts of equity had no power to enforce bequests for charitable uses which would have been void on principles applicable to other trusts, was pronounced untenable in *Vidal v. Girard*, 2 How. 127, 146, and *Perin v. Carey*, 24 How. 465, 501, and declared by the same court in *Ould v. Washington Hospital*, 95 U. S. 303, 309, to be based on a theory that had "nearly disappeared from the jurisprudence of the country": *Russell v. Allen*, 107 U. S. 163, 167; *Frazier v. St. Luke's Church*, 147 Pa. St. 256; *White v. Howard*, 38 Conn. 342, 362.

The heirs at law have not objected to the validity of either of the bequests which are under consideration on account of the provisions for accumulation, but the complaint brings them before us for our advice. The testator has directed that ten thousand dollars out the income of each trust fund shall be added to the principal for one hundred years, and longer if the trustees deem best, and that the income from these annual additions may be used, as it accrues, for the benefit of the charities. There will, therefore, be no period exceeding one year during which the entire income of the entire fund will not be subject to an immediate charitable use.

If these directions for accumulation were invalid they are so far separable from the main provisions of the bequest that the latter would still remain in full force and effect: *Odell v. Odell*, 10 Allen, 1. But if charitable trusts vest and

become operative within the period limited by law, there is nothing in the statutes or jurisprudence of this state which prevents their establishment to endure in perpetuity, and we perceive nothing opposed to public policy in permitting or requiring by their constitution such an increase of the trust ¹²⁸ fund by reasonable additions from the annual income. *Storrs Agricultural School v. Whitney*, 54 Conn. 342, 348. The bequest to the William L. Gilbert Home amounts to four hundred thousand dollars, and that for the Gilbert School to a still larger sum. We do not regard the amount of the annual accumulation directed by the testator as unreasonable in view of the considerable income which will be immediately derived from each fund, and its certain increase by that to accrue from the annual additions. The probable increase during the next century in the population of the state and country will extend the opportunities for usefulness of the institutions which the testator has founded, and give ample field for the use of the larger income which will result from the larger funds. Should the trustees continue the accumulations, after a hundred years, for an unreasonable time, the courts can supply a ready remedy: *Tappan's Appeal From Probate*, 52 Conn. 412, 420.

The complaint in this action sets forth that the site designated for the William L. Gilbert Home, and described in the will as having been acquired from Henry Gay, had been procured by the latter at a cost of ten thousand dollars, and conveyed to the testator in consideration of an agreement by the latter to erect thereon a home for destitute and friendless children and to endow it with half of his estate; and that he did, in fact, during his lifetime, erect thereon a suitable building for such a home, at an expense of forty thousand dollars, and receive into it a number of destitute and friendless children, who were being cared for there at his expense at the time of his decease.

It is also alleged that in 1887 the testator signed a written agreement, reciting that David Strong and others were about to purchase the land which is described in the will as the site of the proposed "Gilbert school," and that they were then to convey it to him free of cost, and that he had made a will giving half his estate to trustees for the establishment and maintenance of an institution to be called "The William L. Gilbert Seminary" on said site; and then providing that said Strong and others were to retain possession of the land

until he or his trustees should be ready to build, and ¹³⁹ should have the use of the hotel buildings thereon for twenty years from the date of their purchase, and that the instrument should remain in the hands of Henry Gay for the benefit both of said Strong and others and of Mr. Gilbert, until the transfer of the land was made and the erection of the building begun. It is further alleged that soon afterwards David Strong and others, citizens of Winchester, at a cost of twenty thousand dollars, in consequence and in consideration of this agreement, bought the land in question, and have ever since held it in trust for the purposes mentioned in the agreement, and are ready and willing to convey it to the trustees, agreeably to the terms of the residuary bequest in the last will of the testator.

Henry Gay is one of the executors of the testator, and he and David Strong are both among the trustees named in the will and parties to this action.

The heirs at law demurred to all these allegations, and their demurrer was sustained by the superior court. By stipulation of the parties the propriety of this action of the superior court has been made the subject of review upon this reservation, as fully as if the question had been raised on appeal after a final judgment in favor of the heirs.

The results to which we have arrived, and which have been already stated, have probably made it unnecessary to decide the point thus presented by the stipulation, but we think it proper to say that the allegations in question seem to us to relate to facts as to which the court had a right to inquire, in order to be placed in the situation of the testator, whether for the purpose of determining the objects of his bounty, the subject of disposition, or the quantity of interest which he intended to give: *Bond's Appeal From Probate*, 31 Conn. 183, 190; *Crosby v. Mason*, 32 Conn. 482, 487.

The first of the two bequests now under consideration is expressed to be "for the purpose of maintaining and supporting a home for destitute and friendless children, permanently," on a certain piece of land owned by the testator; the second is "for the establishment and maintenance of an institution of learning, to be known as the "Gilbert School," ¹⁴⁰ on a certain other parcel owned by third persons. The extrinsic evidence tendered by the allegations in question is that the testator himself built and opened such a "home" as he thought suitable, on the lot described in the will as deeded

to him by Henry Gay, and that it was so deeded by Mr. Gay for that very purpose. Proof of such facts tends to show the exact character of the "home," for the maintenance (not the establishment) of which the will provides.

The second bequest was attacked as contrary to the law against perpetuities, on the ground that it was uncertain whether the site for the proposed school could ever be obtained.

Had David Strong and others conveyed this land to the testator before his death, we think this clearly could have been shown to disprove the possibility of any delay in the vesting of the charity by an event which had occurred before the time when the will first spoke. But if, before that time, they had acquired it in trust for this very use, under a written agreement with him to that effect, proof of such an equitable interest in him as to this property is no less admissible. Their purchase was indeed made with a view to the dedication of the land for the site of an institution to be known as the "William L. Gilbert Seminary," whereas the name given in the will of 1890 is the "William L. Gilbert School"; but if the holders of the land make no objection to this variation, the heirs at law can take no benefit from it.

We think the demurrer to paragraphs eleven, twelve, and fourteen of the complaint should have been overruled.

The complaint also set up that the testator procured, in 1887, a special charter, to the same sixteen persons appointed trustees in his will, by the name of "The William L. Gilbert Home," with authority to receive donations or bequests from him or others made in order to establish and support a home for destitute and friendless children in Winchester, and another charter to them in 1889, by the name of "The Gilbert School of Winchester," with like powers as to the establishment and maintenance of a school. The heirs demurred to these averments, and to the claim predicated upon them, ¹⁴¹ for instructions as to the effect of the charters as respects the trusts created by the will, and the demurrer was properly sustained. Of the existence and terms of these charters the court by statute took judicial notice, but there was nothing in them or in their procurement to affect the construction of the will. As for the claim of the executors that they were relevant to show or to remove a latent ambiguity in the constitution of the trustees, it is enough to say that the will designates these plainly as natural persons, by their proper names, with-

out the use of any words of equivocal description: *Fairfield v. Lawson*, 50 Conn. 501, 510; 47 Am. Rep. 669. Nor would the facts alleged be admissible to rebut a resulting trust, even if the bequests under the terms of the will had been held to be too indefinite and uncertain: *Avery v. Chappel*, 6 Conn. 270, 275; 16 Am. Dec. 53. The resulting trusts which can be rebutted by extrinsic evidence are those claimed upon a mere implication of law, not those arising on the failure of an express trust for imperfection or illegality: 1 Jarman on Wills, 424; 3 Jarman on Wills, 735; 3 Redfield on Wills, 599.

Other questions are raised by the pleadings which it is unnecessary to consider, in view of our opinion that the trusts are valid on the face of the will.

The superior court is advised that the trusts for the benefit of the "William L. Gilbert Home," and of the "Gilbert School," are each valid and operative; that the provisions for accumulation therein contained are valid as respects an accumulation until the end of a hundred years from the testator's decease, and for a reasonable time thereafter, to be determined by the then trustees, subject to the control of the proper court; that the interlocutory judgment sustaining the demurrer of the heirs at law to paragraphs eleven, twelve and fourteen of the complaint should be set aside, and that part of the demurrer overruled; and that the executors should pay and convey the property bequeathed, upon said charitable trusts to the surviving trustees named in the will.

In this opinion the other judges concurred.

CHARITIES.—VALIDITY AND CONSTRUCTION OF BEQUESTS AND DEVICES TO FOR EDUCATIONAL PURPOSES: See the extended notes to *Baptist Church v. Shively*, 1 Am. St. Rep. 415; *Howe v. Wilson*, 60 Am. Rep. 230, and *Owens v. Missionary Society*, 67 Am. Dec. 184.

PERPETUITIES.—For a thorough discussion of the rule against perpetuities in the various states see *Lawrence's Estate*, 136 Pa. St. 354; 20 Am. St. Rep. 925, and note with the cases collected, and the extended note to *Barnum v. Barnum*, 90 Am. Dec. 101.

WILLS—CONSTRUCTION—TRANSPOSING WORDS AND CLAUSES.—Courts will transpose the clauses of a will only when absolutely necessary to do so in order to support the evident meaning of the testator: *Gilmor's Estate*, 154 Pa. St. 523; 35 Am. St. Rep. 855. Repugnant words, in whatever portion of a will they occur, which contravene the evident purpose and intention of the testator as clearly expressed, may be rejected or transposed, or limited and controlled by other and prior provisions, and the general purpose and intent thus clearly manifested: *Dickson v. Dickson*, 138 Ill. 541; 32 Am. St. Rep. 163, and note.

CHARITABLE USES ARE FAVORED in equity, and will be supported when a trust would fail for uncertainty, were it not for the charity: *Johnson v. Johnson*, 92 Tenn. 559; 36 Am. St. Rep. 104, and note; *Raley v. Umatilla County*, 15 Or. 172; 3 Am. St. Rep. 142. See, also, the extended note to *Hove v. Wilson*, 60 Am. Rep. 234.

RITCHIE v. WALLER.

[63 CONNECTICUT, 155.]

MASTER AND SERVANT—COURSE OF EMPLOYMENT—DEVIATION BY SERVANT—LIABILITY OF MASTER.—A farm laborer who, under orders from his master, proceeds with a team and wagon to a brewery some distance from the farm and procures a load of manure without any directions from his master as to the route to be taken in going or coming, and who in returning deviates from the usual route and stops to attend to business of his own, leaving the team unhitched in the highway, is still acting in the execution of the master's business and within the scope of his employment so as to make the master liable for injury to the property or person of a third party, caused by the running away of the team while the servant is thus engaged in the transaction of his own business.

MASTER AND SERVANT—SCOPE OF EMPLOYMENT—QUESTION OF FACT.—Whether or not the act of a servant for which it is sought in a particular case to hold the master liable was done in the execution of the master's business within the scope of the employment is in most cases a question of fact.

MASTER AND SERVANT—DEVIATION BY SERVANT—LIABILITY OF MASTER—QUESTION OF LAW OR FACT.—In most cases when the question of the master's responsibility turns principally upon the mere extent of deviation by the servant from the strict course of his employment or duty, such question is generally one of fact and not of law, and must depend upon the extent of deviation and all the attendant circumstances. When the deviation is slight and not unusual the court may, as a matter of law, determine that the servant was still executing his master's business, or if the deviation is very marked and unusual the court in like manner may determine that the servant was not on the master's business but on his own, relieving the master from liability. Cases falling between these extremes are regarded as involving merely a question of fact to be left to the jury or other trier of these questions.

MASTER AND SERVANT—DEVIATION BY SERVANT FROM COURSE OF EMPLOYMENT—LIABILITY OF MASTER.—In cases of deviation, a mere departure by the servant from the strict course of his duty, even for a purpose of his own, does not in and of itself constitute such a departure from the master's business as to relieve him of responsibility.

MASTER AND SERVANT—DEVIATION OF SERVANT FROM COURSE OF EMPLOYMENT—LIABILITY OF MASTER.—If a servant, while deviating from the strict line of his employment, is really engaged in the execution of the master's business it is immaterial that he joins with this some private business or purpose of his own, and the master is still liable, but if the servant, during such deviation, is on a frolic of his own, without being at all on his master's business, the latter is not liable.

J. J. Rose and G. P. Carroll, for the appellant.

N. W. Bishop and E. O. Hull, for the appellee.

¹⁵⁷ **TORRANCE, J.** This is an action against a master for damage caused by the negligence of a servant.

The court below, upon the facts found, decided that the injury occurred solely through the negligence of the servant. One of the claims of the defendant, though it was not pressed on the argument, is that the court, as matter of law, erred in so doing. Upon this point it is sufficient to say that the record does not present any question of law for review. Upon the facts, as they appear of record, we must regard the decision of the trial court upon this point as final and conclusive.

In the discussion of the case, therefore, we will assume ¹⁵⁸ that the negligence of the servant and the damage resulting therefrom have been determined against the defendant, and that the question of the responsibility of the master therefor alone remains to be considered.

The facts bearing upon this question are, in substance, the following: The defendant is a farmer in Trumbull, and at the time of the injury, in September, 1891, and for some years prior thereto, had been accustomed, twice a week, to get manure for his farm from a brewery on North Washington avenue in Bridgeport. This avenue and Main street intersect at a point called Bull's Head, about a thousand feet south of the brewery. The avenue and Main street are connected by three cross streets, called respectively, beginning with the one next north of Bull's Head, Mulloy's lane, Grand street, and Commercial street. The brewery is nearly opposite the point where Mulloy's lane enters the avenue.

In December, 1890, the defendant hired the servant in question, whose name is Blackwell, as a farm laborer. Soon thereafter the defendant, for the purpose of getting a load of manure, and of showing Blackwell the place to procure it in the future, drove down with him from the farm to the brewery, passing down Main street to Grand, through Grand to North Washington avenue, and thence southerly to the brewery. After getting a load they returned through Grand street to Main and thence northerly home. Neither at that time nor on any subsequent occasion did the defendant give any special directions or instructions as to what particular route Blackwell should follow in going to or returning from the

brewery with manure, although he supposed Blackwell took the same route followed on the first occasion above mentioned. In fact Blackwell went or returned sometimes by way of Mulloy's lane, and sometimes by way of Grand or Commercial street, and the defendant never at any time made any inquiries as to what route he took.

On the day of the injury the defendant told Blackwell to go to the brewery after a load of manure and to spread it on a designated lot on the farm. These were all the directions ¹⁵⁹ given to him. The defendant did not know that he intended to go to any other place.

Pursuant thereto Blackwell, with the wagon and two horses of the defendant, went to the brewery to procure a load of manure. After so doing, instead of returning to Main street through the lane, or Grand or Commercial street, and going thence northerly towards Trumbull as usual, Blackwell drove southerly down the avenue to Bull's Head, and thence into Main street, and thence northerly in the direction of home till he came to a certain shoemaker's shop on Main street, southerly of Mulloy's lane. There he got off of his wagon, leaving his team for about five minutes, and went into the shoemaker's shop. Blackwell's purpose and object in so doing was to see the shoemaker about soleing or mending the shoes belonging to and then worn by him. While he was in the shop the team started at a slow, trotting gait up Main street, till it came opposite the plaintiff's market, where the wheels of the defendant's wagon caught in the left rear wheel of the plaintiff's wagon, upsetting the same, and causing the injuries to the plaintiff and his property referred to in the complaint.

Blackwell was employed by the month, and the carting of the manure was within the ordinary scope of his employment as a servant of the defendant, and he was in the service of the defendant at the time of the accident.

Just here it may be well to call attention to two points in the finding, and to settle its interpretation with reference to them. After stating that Blackwell drove around to the shoemaker's shop, and there left his team and went into the shop, the court, as we have seen, adds that "Blackwell's purpose and object in so doing was to see the shoemaker about soleing or mending his shoes." Now whether the phrase "in so doing," refers to the entire conduct of Blackwell from the time he left the brewery till the horses ran away, or only to his

act in leaving them and going into the shoemaker's shop, is perhaps not free from doubt. We will assume, however, in accordance with what seems to be the claim of the ¹⁶⁰ defendant, that the phrase in question refers to the entire conduct.

Again, the finding is that Blackwell "was in the service of the defendant at the time of the accident." This may mean simply that at the time of the accident his term of service had not expired, and that he had not been discharged, or it may mean that in making the detour he was, and continued to be, in the execution of the master's business within the scope of the employment. We shall, for the purposes of the discussion, assume that the former meaning is the correct one.

Whether then, upon the facts found, the master is responsible for the negligence of the servant, is the important question. The general rule of law applicable to this class of cases is accurately and comprehensively stated in *Stone v. Hills*, 45 Conn. 47, 29 Am. Rep. 635, as follows: "For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible."

Of these "conditions" of liability, the one under which the present case seems to fall, if it falls under any of them, is the one for acts done "in the execution of the master's business within the scope of his employment." This rule or "condition" of liability is in itself simple and intelligible enough, but in determining whether any particular case falls within it or not, difficult and troublesome questions may arise. "The cases which have arisen upon this subject have from the earliest times been productive of much astute and interesting discussion in courts of law, and eminent judges have differed widely in their decisions. It has always been a matter of extreme difficulty to apply the law to the ever varying facts and circumstances which present themselves": *Rayner v. Mitchell*, L. R. 2 C. P. D. 357.

¹⁶¹ In reality, however, the difficulty here spoken of arises in ascertaining whether the act was done in the execution of the master's business within the scope of his employment,

which as we shall see is ordinarily a question of fact, and not in applying the rule when that fact has been ascertained. This fact once determined, the rule can be easily applied, but the rule cannot at all aid in the determination of the fact. The rule tells us that the master's liability depends upon whether the acts were done in the execution of his business within the scope of his employment, but it does not help us to determine whether they were or not so done.

In like manner the general rule of construction is that the intent of the parties shall prevail. This tells us what to do when the intent has been ascertained, but affords no aid in a particular case in ascertaining what the intent is. Whether then the act of a servant, for which it is sought in a particular case to hold the master responsible, was done in the execution of the master's business within the scope of the employment or not, must from the nature of things in most cases be a question of fact to be determined as such by the jury or other trier, because no general rule of law has been or probably can be laid down, the application of which will determine the matter in all cases. Sometimes, however, this question is determined by the court as a matter of law. But in by far the greater number of cases where the question of the master's responsibility turns, as in the present case, principally upon the mere extent of deviation by the servant from the strict course of his employment or duty, it has been generally held to be one of fact and not of law.

In such case it is, and must usually remain, a question depending upon the degree of deviation and all the attendant circumstances. In cases where the deviation is slight and not unusual, the court may, and often will, as matter of law, determine that the servant was still executing his master's business. So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded ¹⁶³ as involving merely a question of fact, to be left to the jury or other trier of such questions.

Thus, in *Phelon v. Stiles*, 43 Conn. 426, the deviation by the servant from the strict course of his duty was so slight that this court, as matter of law, held the master liable; while in *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635, the deviation was so marked and unusual that it refused to hold the master responsible.

On the other hand, where a servant, contrary to his duty, and solely for a purpose of his own, drove his master's horse and cart a quarter of a mile out of the way, the question whether in and while so doing he was in the execution of his master's business within the scope of his employment was left to the jury as a question of fact: *Whatman v. Pearson*, L. R., 3 Com. P. 422. "Whether the servant is really bent on his master's affairs or not is a question of fact, but a question which may be troublesome": Pollock on Torts, side p. 71. In the following cases, among many others, this question was decided as one of fact: *Kimball v. Cushman*, 103 Mass. 194; 4 Am. Rep. 528; *Redding v. South Carolina R. R. Co.*, 3 S. C. 1; 16 Am. Rep. 681; *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 129; 21 Am. Rep. 597; *Cormack v. Digby*, 9 L. R. C. L. 557; *Burns v. Poulson*, L. R. 8 Com. P. 563.

In cases of deviation the authorities are clearly to the effect that a mere departure by the servant from the strict course of his duty, even for a purpose of his own, will not in and of itself be such a departure from the master's business as to relieve him of responsibility. "Not every deviation of the servant from the strict execution of his duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility. But where there is not merely deviation but a total departure from the course of the master's business, so that the servant may be said to be 'on a frolic of his own,' the master is no longer answerable for the servant's conduct": Pollock on Torts, side p. 76.

In the case of *Joel v. Morrison*, 6 Car. & P. 501, the jury were told that if the servant with his master's horse and ¹⁶³ cart made a detour in order to call upon a friend, or if when driving on his master's business he went out of his way against his master's implied commands, the master remains liable for the servant's negligence while *extra viam*; but that "if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

If the servant in going *extra viam* is really engaged in the execution of the master's business within the scope of his employment it is immaterial that he joined with this some private business or purpose of his own. Thus in *Patten v. Rea*, 2 Com. B., N. S., 605, the servant started out on business of the master, and also to see a doctor on his own account. While on his way to see the doctor he negligently

drove against a horse and killed it, and the master was held responsible.

In *Sleath v. Wilson*, 9 Car. & P. 607, the master was held liable for the negligent act of his servant, who, after having set his master down, drove around to deliver a parcel of his own, and did not drive directly where he had been ordered to go: See the case, also, of *Cormack v. Digby*, 9 I. R. C. L. 557, upon this point. In *Storey v. Ashton*, L. R., 4 Q. B. 476, Chief Justice Cockburn says: "I think that if a driver, while acting in his master's business, were to make a slight deviation to carry some business of his own into effect, in such a case the master might be liable, and that the question would be one of degree as regards the extent of the deviation. . . . I am far from saying if the servant when going on his master's business took a somewhat longer road, that owing to the deviation he would cease to be in the employment of the master so as to divest the latter of all responsibility; in such cases it is a question of degree as to how far the deviation could be considered as a separate journey."

In *Whatman v. Pearson*, L. R., 3 Com. P. 422, the servant with the horse and cart of the master, contrary to express orders, went a quarter of a mile out of his way purely for a purpose of his own, and the master was held responsible. In *Mitchell v. Crassweller*, 13 Com. B. 237, Maule J., said: "The ¹⁶⁴ master is liable even though the servant in the performance of his duty is guilty of a deviation, or a failure to perform it in the strictest and most convenient manner."

In some of its aspects the case of *Quinn v. Power*, 87 N. Y. 535, 41 Am. Rep. 392, is somewhat similar to the case at bar. There a boatman at a certain town on the Hudson river applied to the pilot in charge of a ferry-boat asking to be put on board of a canal-boat, then in midstream. The pilot, without compensation and apparently out of mere "good nature," agreed to do so. Similar acts had occasionally been done before, but without the knowledge or express authority of the master. To reach the canal-boat the pilot diverged from his regular course, and while so out of his course, through the negligence of those in charge of the ferry-boat, a collision with a canal-boat occurred. In behalf of the master it was urged that his servants, when the collision occurred, were not acting in his business or within the scope of their employment, but in the execution of an independent purpose of their own not connected with the master's business. But upon this

point the court said: "We do not concur in this view of the transaction. At most, it appears to us a case where the servant, while acting in the master's business, and within the scope of his employment, deviated from the line of his duty to his master and disobeyed his instructions. When this ferry-boat left the dock at Athens it started for its terminus at Hudson. It took freight and passengers to transfer across the river. Servants and boat, as the latter moved out into the river, were doing the master's business and acting in the line of duty and of employment. There was a usual track or route by which the boat crossed. It may even have been selected and dictated by the owner. In deviating from it the servants might disregard the instructions of the master, but they were none the less engaged in the master's business of transporting passengers from Athens to Hudson because they did not follow the usual route or pursued another or even a forbidden track. They were still doing their employer's work, though in a manner contrary to his instructions. If they stopped the boat in the middle ¹⁶⁵ of the river, they did not cease to be engaged in the master's business. Even if the motive was some purpose of their own, they were still about their usual employment, although pursuing it in a way and manner to subserve also such purpose. When they took this passenger to the tow, and in so doing deviated from the usual route and stopped the boat midriver for that reason, they were still engaged in the master's business of transporting freight and passengers across the river. They were doing it in a mode and manner perhaps not authorized, and possibly in some sense to effect a purpose of their own, but none the less acting within the scope of their employment and engaged in the master's business.

Some of the above remarks are quite applicable to the case at bar. In making the detour Blackwell was still in charge of his master's team, though on a roundabout way home, carting manure to his master's farm. That was his main purpose and object throughout the entire transaction. In the language of the case last cited, even if the motive was some purpose of his own, he was still about his usual employment, although pursuing it in a way and manner to subserve such purpose also.

Applying these principles to the case at bar, the question for the court below was whether or not Blackwell, for the time being, totally departed from the master's business and set out

upon a separate journey and business of his own. If the rule of law were that any deviation by the servant "to carry some business of his own into effect" was of itself such a departure, the above question would be one of law. But this, as we have seen, is not the rule of law. To decide the question in a case like the present, the trier must take into account, not only the mere fact of deviation, but its extent and nature relatively to time and place and circumstances, and all the other detailed facts which form a part of and truly characterize the deviation, including often the real intent and purpose of the servant in making it.

Without spending more time upon this point, we think the above question is one of fact in the ordinary sense, and ¹⁶⁶ that the case at bar clearly falls within the class of cases where such question is strictly one of fact to be decided by the trier. As such we think the court below decided it. It is true that upon our interpretation of the finding the court below has not found formally and in terms that Blackwell, during the time of the detour, was in the execution of his master's business, and perhaps such interpretation does that court an injustice; but, however this may be, the court, in deciding as it did, necessarily found that Blackwell continued in the execution of the master's business all the time, and this is enough without so finding in terms. This court will not review such a finding upon the errors assigned.

If, however, we should hold the question raised upon this point to be one of law, we have no hesitation in saying that the court below reached the correct conclusion on the facts found. In either point of view, then, there is no error.

The remaining question relates to the allowance of the amendment. The complaint alleged that the damage was done by the defendant, while the proof was that it was done by his servant. After the plaintiff rested, the defendant moved for a nonsuit on the ground of this variance, and the court permitted the plaintiff to amend his complaint in this respect. According to the record, the only objection made by the defendant was a general one to the allowance of the amendment, and the error assigned upon this point seems to relate wholly to the allowance of the amendment. Under the statute, section 1023, the court clearly had the discretionary power to allow the amendment, and the power, for aught that we can see, was very properly exercised: *Santo v. Maynard*, 57 Conn. 157.

The real grievance of the defendant, however, upon this part of the case, as stated upon his brief, seems to be that he was not allowed time to demur to the amended complaint. Now, if we admit, for argument's sake, that the amended complaint was demurrable, there are two sufficient answers to this claim of the defendant. The first is that it is not fairly included in the assignments of error, and the second is that it nowhere appears that the defendant asked or offered ¹⁶⁷ to demur, or that his right to do so was questioned or denied by the court below.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

MASTER AND SERVANT—MASTER'S LIABILITY TO THIRD PERSONS—DEVIATION BY SERVANT.—Though the injury done by a servant consists of acts in departure from the authority conferred or implied, nevertheless when they occur in the course of the employment the master is answerable for the wrong committed: *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 261; 28 Am. St. Rep. 632, and note; *Lake Shore etc. R. R. Co. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510. A master is liable for the act of a servant in leaving a truck in a public street, although the act be done in violation of the master's orders: *Powell v. Deveny*, 3 Cush. 300; 50 Am. Dec. 738. Where a servant performs the duty for which he is engaged in such a manner as to injure another, the master is liable, although he may have forbidden the act: *International etc. Ry. Co. v. Anderson*, 82 Tex. 516; 27 Am. St. Rep. 902, and note with the cases collected. A servant is deemed to be in the master's service whenever present to perform his duty under the contract creating the relation of master and servant, although at the time he may not be engaged in the performance of any duty: *East Line etc. R. R. Co. v. Scott*, 71 Tex. 703; 10 Am. St. Rep. 804. If, however, a servant acts without reference to the service in which he is employed to effect some independent purpose of his own, the master is not liable: *Stephenson v. Southern Pac. Co.*, 93 Cal. 558; 27 Am. St. Rep. 223, and note. A servant may depart from his employment without making the master liable for his negligence, and he so departs whenever he goes beyond the scope of his employment, and engages in affairs of his own: *Pittsburgh etc. Ry. Co. v. Shields*, 47 Ohio St. 387; 21 Am. St. Rep. 840, and note. A master is civilly liable for the manner in which a servant does his work, although the manner in which he does it is contrary to his instructions: *McClung v. Dearborne*, 184 Pa. St. 396; 19 Am. St. Rep. 708, and note; *Golden v. Newbrand*, 52 Iowa, 59; 35 Am. Rep. 257; *New Orleans etc. R. R. Co. v. Harrison*, 48 Miss. 112; 12 Am. Rep. 356, and note. See, further, the extended notes to *Baird v. Shipman*, 22 Am. St. Rep. 514, and *Blake v. Ferris*, 55 Am. Dec. 317.

FORCE v. GREGORY.

[68 CONNECTICUT, 167.]

PHYSICIANS—DEGREE OF SKILL AND DILIGENCE REQUIRED OF.—Physicians and surgeons by holding themselves out to the world as such impliedly contract that they possess the reasonable and ordinary qualifications of their profession, and are under a duty to exercise reasonable and ordinary care, skill, and diligence. In determining what constitutes such skill and diligence, the test is that which physicians and surgeons in the same neighborhood and same line of practice ordinarily have and exercise in like cases at the time of the treatment.

PHYSICIANS OF DIFFERENT SCHOOLS—ABILITY OF, HOW MEASURED.—If a physician belonging to a certain particular and distinct school of medicine is sued for malpractice, his treatment is to be tested by the general doctrines of his school, and not by those of other and different schools of practice.

PHYSICIANS OF DIFFERENT SCHOOLS—ABILITY AND TREATMENT OF, HOW TESTED.—If a physician called to treat a patient adopts the treatment, not of one particular school in the abstract, but of his own particular school, which he publicly professes and practices, and is then sued for malpractice, and the medical testimony offered by the plaintiff relates to treatment prescribed by a different school, such testimony must be weighed, not alone with regard to bias and prejudice influencing the testimony of witnesses, but with regard to bias or prejudice which might influence or incline the jury in favor of one school rather than the other, and the jury must be instructed not to judge by determining which school in their own view is best.

J. W. Webster, for the appellant.

C. G. Root, for the appellees.

168 FENN, J. This is an action by a minor child to recover damages against the defendant, who is a homœopathic physician, for alleged malpractice in treating her for ophthalmia. The jury returned a verdict for the plaintiff, and from the judgment rendered thereon the defendant appealed to this court.

The only questions presented which are necessary to consider relate to the charge of the court to the jury. Evidence was offered to show that the defendant in treating the plaintiff adopted the remedies prescribed by the homœopathic practitioners. It appeared that the allopathic school of medicine would treat such a case differently, and in the latter way the plaintiff claimed that she ought to have been treated. The defendant asked the court to charge the jury—"that treatment by a physician of one particular school is to be tested by the general doctrines of his school, and not by those of other schools." The court refused to so charge, and charged as follows: "In regard to that matter, I will say

that the defendant's negligence or want of skill in the treatment of the plaintiff's eye must be determined by all of the ¹⁶⁹ evidence in the case, and if the defendant adopted the treatment laid down by one particular school of medicine, and the medical testimony offered by the plaintiff related to treatment prescribed by a different school, you will weigh the testimony, having regard to any bias or prejudice that might influence the testimony of those who belonged to a different school from that of the defendant. You should also take into consideration the training and education of the defendant for his profession, the experience which he has had, and the degree of skill with which he handled the case, all bearing upon the question whether the defendant used ordinary care and skill in the treatment of the plaintiff." The defendant claims that the court erred, both in refusing to charge as requested and in charging as it did.

In the absence of special contract, physicians and surgeons, by holding themselves out to the world as such, impliedly contract that they possess the reasonable and ordinary qualifications of their profession, and are under a duty to exercise reasonable and ordinary care, skill, and diligence: *Landon v. Humphrey*, 9 Conn. 209; 23 Am. Dec. 333; *Kendall v. Brown*, 74 Ill. 232; *Small v. Howard*, 128 Mass. 131; 35 Am. Rep. 363; *Ballou v. Prescott*, 64 Me. 305; *Leighton v. Sargent*, 31 N. H. 119; 64 Am. Dec. 323; *Ely v. Wilbur*, 49 N. J. L. 685; 60 Am. Rep. 668; *Potter v. Warner*, 91 Pa. St. 362; 36 Am. Rep. 668; *Hathorn v. Richmond*, 48 Vt. 557; *Gates v. Fleischer*, 67 Wis. 504. In determining what constitutes reasonable and ordinary care, skill, and diligence, the test is that which physicians and surgeons in the same general neighborhood and in the same general line of practice ordinarily have and exercise in like cases: *Hathorn v. Richmond*, 48 Vt. 557; *Utey v. Burns*, 70 Ill. 162; *Almond v. Nugent*, 34 Iowa, 300; 11 Am. Rep. 147; *Small v. Howard*, 128 Mass. 131; 35 Am. Rep. 363; *Leighton v. Sargent*, 31 N. H. 119; 64 Am. Dec. 323. In addition to this, however, regard must be had to the advanced state of the profession at the time of the treatment: *Small v. Howard*, 128 Mass. 131; *Gates v. Fleischer*, 67 Wis. 504; *Smothers v. Hanks*, 34 Iowa, 286; 11 Am. Rep. 141; *Nelson v. Harrington*, 72 Wis. 591; 7 Am. St. Rep. 900.

Premising these general principles, we come to the precise question presented by the appeal: Ought the defendant's ¹⁷⁰ request to charge to have been complied with? And was

the charge, as given, correct and sufficient? The language of the request may be found in *Patten v. Wiggin*, 51 Me. 594, 81 Am. Dec. 593, where the following charge was held to be correct: "If there are distinct and different schools of practice, and a physician of one of those schools is called in, his treatment is to be tested by the general doctrines of his school, and not by those of other schools. It is to be presumed that the parties so understood it. The jury are not to judge by determining which school, in their own view, is best." And the same principle was clearly stated, in an able opinion, in *Bowman v. Woods*, 1 G. Greene, 441, and we are aware of no authority to the contrary. But notwithstanding this, it seems to us that the inherent difficulty in an endeavor to vindicate the action of the court below is not because the court failed to charge in the identical language of the request, nor because of the language actually used by the court, which appears correct so far as it goes, but rather because the court, in refusing to charge as requested, and only charging as it did, omitted to bring to the attention of the jury a consideration which, in view of the testimony received, and the claims made thereon by counsel, ought to have been presented to them. It having appeared how the allopathic school of medicine would treat a case of the character of the one in question, the court, as we have seen, said: "If the defendant adopted the treatment laid down by one particular school of medicine, and the medical testimony offered by the plaintiff related to the treatment prescribed by a different school, you will weigh the testimony, having regard to any bias or prejudice that might influence the testimony of those who belonged to a different school from that of the defendant." Doubtless this is correct; the testimony should be so weighed. But if the defendant adopted the treatment, not of one particular school in the abstract, but of his own particular school, which he publicly professed and practiced, and the medical testimony offered by the plaintiff related to treatment prescribed by a different school, such testimony should be weighed, not alone with regard to bias or prejudice influencing the testimony ¹⁷¹ of witnesses, but with regard to bias or prejudice which might influence or incline the jury in favor of one school rather than the other. For, as was said in *Patten v. Wiggin*, 51 Me. 594, 81 Am. Dec. 593: "The jury are not to judge by determining which school, in their own view, is best."

And as it seems to us from the testimony presented, which

did not stop with the statement of how, in the view of the witnesses, such a case ought to be treated, but went farther, and stated how "the allopathic school of medicine would treat it," it was precisely from such bias or prejudice the defendant stood in danger. Indeed, the counsel for the plaintiff freely admitted in argument before us that the respective merits of the two schools of medical practice were, and as he claimed, of right ought to have been, on trial before the jury.

We cannot concede such right, and the jury, we think, should have been told that the relative merits of the two schools were in no sense before them for their consideration; that so far as the defendant was to be judged by either, it was by the tenets, rules, principles, and practices of his own school, not by those of another; and that if the defendant adopted the treatment laid down by his own school, the fact that another school prescribed another treatment tended in no wise to show that the defendant was chargeable with lack of skill or negligence. It would seem that if it could be held negligent or unskillful in a given case to use the treatment prescribed by the school to which the practitioner belonged, such negligence or want of skill must consist either in the mode of use, the application of such remedies under improper circumstances, or because they were intrinsically wrong, inappropriate, or inadequate. If there be any valid objection to the language quoted from *Patten v. Wiggin*, 51 Me. 594, 81 Am. Dec. 593, it is in the failure to incorporate with the general statement the further one that the test there given does not exclude the duty of keeping pace with the progress of professional knowledge, ideas, and discoveries, to the extent that a faithful, conscientious, and competent practitioner, of whatever school, may be reasonably expected, and is therefore lawfully required to do, not because the test of the treatment of some other school can be applied. It may be added¹⁷² that the general expressions in the charge under consideration, that the question of the defendant's negligence "must be determined by all of the evidence in the case," and that the jury should consider "the training and education of the defendant for his profession, the experience which he had had, and the degree of skill with which he handled the case," in no sense appear to meet or supply the wanting element in the charge, and that because of such element, if the unqualified language of the request was too broad, still the rule stated in *Seeley v. Town of Litchfield*, 49 Conn. 138, applies, and that

“if it was not the duty of the court to charge precisely as requested, yet it was its duty to respond to the request by charging the jury correctly on that subject.”

It was not claimed that the fact that the plaintiff was an infant of tender years, incapable of contracting, and that the physician was called by her father, in any way extended or altered the implied contract and duty of the defendant. Nor do we think such a claim, if made, would have been valid. It appeared that the defendant had at least to some extent been the family physician, and had previously, as such, prescribed for the plaintiff; but this circumstance also is one to which no importance has been attached.

There is error, and a new trial is granted.

In this opinion the other judges concurred.

PHYSICIANS AND SURGEONS—DEGREE OF SKILL AND CARE REQUIRED OF.—The degree of care and skill required of a physician in the performance of his duty is such as physicians ordinarily exercise in the treatment of their patients: *State v. Housekeeper*, 70 Md. 162; 14 Am. St. Rep. 340, and notes; note to *Nelson v. Harrington*, 7 Am. St. Rep. 909; and the extended notes to *Holtzman v. Hoy*, 118 Ill. 534; 59 Am. Rep. 392-398; and *Howard v. Grover*, 28 Md. 97; 48 Am. Dec. 481-487. See, also, *Lawson v. Conway*, 37 W. Va. 159; *ante*, p. 17, and note; and *Du Bois v. Decker*, 130 N. Y. 325; 27 Am. St. Rep. 529, and note.

PHYSICIANS OF DIFFERENT SCHOOLS—ABILITY, HOW MEASURED.—The treatment of a physician of one particular school is to be tested by the general doctrines of his school, and not by those of other schools: *Patten v. Wiggin*, 51 Me. 594; 81 Am. Dec. 593. A physician or surgeon is bound to exercise such reasonable care and skill as is possessed and exercised by physicians and surgeons in good standing of the same system or school of practice in the locality of his practice, having due regard to the advanced state of medical and surgical science at the time: *Nelson v. Harrington*, 72 Wis. 591; 7 Am. St. Rep. 900.

CRANDALL'S APPEAL.

[63 CONNECTICUT, 365.]

WILLS—UNDUE INFLUENCE—MENTAL CAPACITY—EVIDENCE OF.—The contents of a will constitute the highest evidence of the capacity or incapacity of the testator. If its provisions under all the circumstances are just and reasonable, this is a circumstance tending to prove capacity and to disprove undue influence precisely as an absurd and unreasonable will tends to prove the contrary.

WILLS—MENTAL CAPACITY—UNEQUAL PROVISIONS AS EVIDENCE OF UNDUE INFLUENCE.—If the jury find from all the evidence, giving the character of the contents of the will its due weight as evidence, that the testator had sufficient mental capacity, then the equity or inequity of the disposition of the estate does not invalidate the will.

WILLS—CAPACITY AND UNDUE INFLUENCE—VALUE OF TESTIMONY OF ATTESTING WITNESSES.—The evidence of the attesting witnesses to a will as to mental capacity or undue influence is not entitled to special consideration or prominence merely because they are attesting witnesses. On the contrary, the value of their evidence is exactly the same as that of any other witnesses of equal intelligence, with equal means of knowledge and observation, and equally credible.

C. E. Searls and J. H. Potter, for the appellants.

E. M. Warner and L. B. Cleveland, for the appellees.

366 CARPENTER, J. This is an appeal from a probate decree establishing the last will and testament of Ebenezer Farrows. The will was attacked on two grounds—mental incapacity and undue influence. On the trial to the jury the proponents of the will presented to the court several requests to charge the jury. These requests were not complied with in terms, and the appellees insist that they were not complied with in substance. The jury returned a verdict against the will, and the appellees appealed to this court.

The reasons of appeal allege that the court erred in respect to each of the six requests. We will consider the requests in their order.

The first request is as follows: "The jury have nothing to do with the equity or inequity of the testamentary dispositions of property, provided they believe from the evidence that the alleged testator had sufficient mental capacity to make a will, as explained in these instructions, and that the will was made of his own free will by the testator."

This request is somewhat ambiguous, at least its precise **367** meaning is obscure, so that if given literally it might, and probably would, have been misleading or confusing. If by the request it was intended that the jury should be instructed that the terms of the will should be entirely disregarded in considering the evidence tending to prove and to disprove capacity or undue influence, the request clearly should not have been complied with. Mr. Chamberlin, in his work on American Commercial Law for Business Men, on page 854, says: "If the will was written by the testator himself, the character of its contents is the highest evidence of his capacity or incapacity." And we may add that even if the will was dictated by the testator, and its provisions under all the circumstances seem to be just and reasonable, that certainly is a circumstance tending to prove capacity and to disprove undue influence, precisely as an absurd or unreasonable will

tends to prove the contrary. Such seems to be the teaching of 1 Swift's Digest, 140: "If the disposition of the estate be very unreasonable and improper, as giving it to strangers, or all to one child, this will be a strong circumstance from whence to infer undue influence and want of understanding."

It may be suggested that the meaning is, that if the jury find from all the evidence, giving the character of the contents of the will its due weight as evidence, that the testator had sufficient testamentary capacity, etc., then the equity or inequity of the disposition of the estate should not invalidate the will. If that is its true meaning, we think counsel were singularly unfortunate in their use of language. It is not probable that the court so understood the request, and it is quite certain that, if the charge had been given as requested, the jury would not have so understood it without considerable explanation. The court is not bound to charge in the language of a request when the language will be likely to be misunderstood without further explanation.

It is apparent that the word "evidence," as used in the request, signifies that given by witnesses as distinguished from the contents of the will. While the latter is evidence in a broad sense, yet it is manifest that the word was used ~~368~~ in a more limited sense. As thus used, the obvious meaning of the request is that the contents of the will should be excluded as evidence on the main issue. That is not law, and the instruction was properly refused.

The second request is: "The jury should give special prominence to the testimony of the three attesting witnesses, both upon the question of capacity and of undue influence, because they were present at the time and place of the execution of the will, and had the means and the opportunity of judging of the testator's capacity, and are regarded in the law as placed around the testator in order that no fraud may be practiced upon him in the execution of the will and to judge of his capacity."

The effect of a compliance with this request would have been to place the attesting witnesses upon a higher plane in the estimation of the jury on the question of capacity and of undue influence than other witnesses, although the latter may have had equal or even superior means of knowledge. That was, in effect, the claim of the appellees. And they now claim that the refusal of the court to comply with this request was an error which entitles them to a new trial. We

are aware of no principle of law, or of any adjudged case, which will justify this claim as broadly as it is here made.

In the eye of the law all witnesses of equal intelligence, and with equal means of knowledge, are equally credible. Had there been three other witnesses present, and their attention had been called to the condition of the testator, precisely as was that of the attesting witnesses, we know not why their testimony would not have been entitled to the same consideration on the question of capacity and of undue influence. As the case stood, the attesting witnesses were present when the will was executed, and had an opportunity to observe the condition of the testator at that precise time. The other witnesses were not present, and had no such opportunity. So far as that matter was concerned, the appellees had the full benefit of it; for the jury were fully and clearly told that the question was as to the condition of the testator at that time, and that the nearer to that time the witnesses observed him the more important was their testimony. We know of no other advantage that those witnesses had in respect to the questions in issue. The appellees cite and rely upon *Field's Appeal from Probate*, 36 Conn. 277. But that case does not sustain their claim.

The third, fourth, fifth, and sixth requests were fully complied with by the court. As no question of law is presented under them, it is unnecessary to notice them further.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

WILLS—MENTAL CAPACITY—CONTENTS OF WILL AS EVIDENCE.—The nature and terms of a will are to be judicially regarded as an essential and important part of the evidence of testamentary capacity, and its consistency or inconsistency must also be regarded with relation to the situation and natural inclinations of the testator: *Hammond v. Dike*, 42 Minn. 273; 18 Am. St. Rep. 503, and note; *Davis v. Calvert*, 5 Gill & J. 269; 25 Am. Dec. 282. To aid in determining whether a will is the product of a disordered mind, its disposing parts may be examined to ascertain whether they appear to be so extravagant and unreasonable as not to be fairly attributable to a sound mind: *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220, and note; note to *Richmond's Appeal*, 21 Am. St. Rep. 96, 99. A testator may dispose of his property as he pleases, and it is not evidence of mental incapacity that he distributes it among certain of his relatives and entirely omits others: *Spratt v. Spratt*, 76 Mich. 384. Undue influence cannot be presumed from the mere fact that the provisions of the will are much more favorable to some of the beneficiaries than to others: *In re Hess' Will*, 48 Minn. 504; 31 Am. St. Rep. 665, and note at page 681; *Maddox v. Maddox*, 114 Mo. 35; 35 Am. St. Rep. 734; but such a disposition of his property may be considered in con-

nection with other facts in determining the testator's mental capacity: *Knox v. Knox*, 95 Ala. 495; 36 Am. St. Rep. 235.

WILLS—EVIDENCE OF ATTESTING WITNESS AS TO TESTATOR'S CAPACITY. The testimony of subscribing witnesses to a will are not conclusive as to the testator's sanity or insanity: *Howard's Will*, 5 T. B. Mon. 199; 17 Am. Dec. 60; but the evidence of witnesses who were present at the execution of the will is entitled to peculiar weight, and especially is this the case with attesting witnesses: *Kerr v. Lunsford*, 31 W. Va. 659. See, also, on this point, the note to *Potts v. House*, 50 Am. Dec. 361.

GRANT v. GRANT.

[68 CONNECTICUT, 530.]

STATUTE OF FRAUDS—SPECIFIC PERFORMANCE OF PAROL CONTRACT.—ACTS OF PART PERFORMANCE are sufficient to take a parol contract out of the operation of the statute of frauds if they are such as clearly refer to some contract in relation to the subject matter in dispute, the terms of which may then be established by parol.

WILLS—PAROL AGREEMENT TO MAKE—SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—PART PERFORMANCE.—A parol agreement which expressly calls for succession by will to both real and personal property, and which is made in consideration of a child becoming the member of a family, is entire and within the statute of frauds and cannot be specifically enforced in equity upon the death of the promisor without performance on his part; nor will the fact that such child has performed its part of the contract constitute such part performance as to relieve the case from the operation of such statute.

WILLS—PAROL AGREEMENT TO MAKE—BREACH OF—DAMAGES FOR SERVICES.—If services have been performed under a parol contract in consideration of property to be conveyed by will, and a breach of the contract cannot be enforced by reason of the statute of frauds an action will lie against the personal representative of the decedent, on a *quantum meruit*, to recover the value of such services. In such case the value of the services performed, and not the value of the property agreed to be conveyed, is the measure of damages, and before the plaintiff can maintain his action he must allege and prove, that prior thereto he had presented his claim against the estate and to the personal representative of the decedent.

WILLS—PAROL AGREEMENT TO MAKE—BREACH OF—DAMAGES FOR SERVICES.—When services are rendered by one person to another in pursuance of a parol mutual understanding and agreement between them, that compensation for them should be made by will, and the party receiving such services dies without making the expected compensation, the party rendering the services is entitled to compensation out of the estate of the deceased as a creditor for the value of such services.

Webster and O'Neill, for the plaintiff.

Gideon H. Welch, for the defendant.

536 FENN, J. The plaintiff, now twenty-three years of age, when about four, went to reside with William Grant of Torrington, and his wife, in consequence of a verbal promise made by Mr. Grant to her parents, that if they would let him adopt the child as his own he would take her with him to his home, and, as he and his wife had no children of their own, they would educate and maintain her; that he had some property, and when he died the child should have it, what there was left of it, just the same as if she were his own daughter. Immediately after she went to reside in the family Mr. Grant and his wife commenced calling her "Tiny Grant," by which name she has ever since continued to be known and called. Mr. and Mrs. Grant were always kind and affectionate towards her, treated her as their own daughter, clothed, maintained and educated her in the district school of the town, and did every thing for her which kind and affectionate parents could or would do for their own daughter.

On the other hand, she was kind and affectionate towards them and did every thing for them, which a kind and affectionate daughter could or would do for her parents. After she arrived at a suitable age, she assisted Mrs. Grant about the house, washed the dishes, made the beds, did sweeping and house-cleaning, according to her years, and ran errands as required. This she continued to do down to the date of Mr. Grant's death. On three or four occasions he was sick, and suffered on each of these occasions for several weeks. On these occasions she waited upon him, nursed and cared for him, and he refused to let any one else attend upon him. He stated to her that she would be well rewarded for what she had done for him and for his wife. "You remain with us, Tiny," said he, "and after I am gone, you will be well provided for; what I have left shall belong to you." These **537** remarks and others like them, he made a great many times to the plaintiff, to his wife, and to a number of his neighbors. In consequence of these promises made to her parents and to herself, the plaintiff was induced to remain with Mr. and Mrs. Grant as she did.

Mr. Grant died March 4, 1893, leaving no children of his own, but a wife and sister survived him. He died intestate, having never adopted the plaintiff in accordance with the laws of this state. She had never requested such adoption, because she did not know or understand that any legal formalities were required, and expected that Mr. Grant would

make the promised provision for her by will. His property at the time of his death consisted of a little over twelve thousand dollars in all; of which about twelve hundred dollars was real estate.

The above facts, found by a committee, are, though in greater detail, in substantial accordance with, and affirmance of, the allegations of the plaintiff's complaint against Mrs. Grant (the widow) and as administratrix of the decedent's estate. Upon such recited facts, the claim of the plaintiff, as quoted from the brief in her behalf, was: "If William Grant had made a will, devising and bequeathing all of his estate to this plaintiff, his widow would first be entitled to one-half of the personal property, and to the use of one-third of the real estate." The plaintiff asked for a decree that the other half of the personal property shall be paid over to her; and that the title to the real estate, subject to the widow's dower, shall be vested in her, or that a decree will be passed giving her an equivalent for these.

The committee, in addition to the facts above recited, also made the following finding: "The plaintiff also asks me to find the value of her services to Mr. Grant while she remained in his family, for the purpose of obtaining judgment for the amount, in case she is not entitled to the equitable relief prayed for. On this subject I find it impossible to place a pecuniary value on the plaintiff's affection and tenderness for Mr. and Mrs. Grant. I find, however, that for the seven years next preceding Mr. Grant's death, on March 4, 1893, ~~538~~ her services to Mr. Grant were and are reasonably worth, as a mere servant, twelve dollars per month, and that interest should be computed thereon, if the above facts will authorize it; and if it is legally and equitably right so to do, I find that this interest ought to be compounded annually."

From the foregoing statement it is manifest that the reservation of this case for advice, made by the superior court, presents for our consideration two questions: 1. Is the plaintiff, upon the facts found, entitled to the specific equitable relief prayed for? and 2. If not, is she entitled to recover damages in this action, and upon this complaint?

It seems to us that there are conclusive reasons why specific performance, as prayed for, cannot be granted. The alleged contract was wholly by parol, the consideration indivisible; it provided in effect that the plaintiff, upon the death of the defendant's intestate, should succeed to a child's

share in all the property of said intestate; and that such property at his death consisted of real as well as personal estate. The contract, therefore, was entire. It applied equally to every part of the estate. It concerned an interest in lands, and was within the statute of frauds: *Shahan v. Swan*, 48 Ohio St. 25; 29 Am. St. Rep. 517; *Donahue's Appeal*, 62 Conn. 370, 372; *Meyers v. Schemp*, 67 Ill. 469; *Pond v. Sheean*, 132 Ill. 312, 323; *Clark v. Davidson*, 53 Wis. 317; *Ellis v. Cary*, 74 Wis. 176; 17 Am. St. Rep. 125; *Gould v. Mansfield*, 103 Mass. 408; 4 Am. Rep. 573.

In some of the cases, above cited, the alleged agreement, or promise, expressly called for succession to both real and personal property; and in one of them it appeared that real property was owned at the date of the contract. In other cases the promise did not so expressly embrace both, but was in general language as in the case before us; nor did it appear whether any real estate was owned at the date of the contract. Neither such express language, or such ownership has however, by any of the courts been regarded as controlling considerations; nor ought they to be. The mischief which the statute was intended to remedy—the setting up parol land titles—would occur equally in either case. And in ⁵³⁹ every case, in which the effect of the contract, if capable of enforcement, would be a transfer of land, and therefore in every case where such a result might at the time the contract was made, have been contemplated as its possible effect and afterwards found to be its necessary one, if the contract is enforced, such contract falls within the operation of the statute.

But the plaintiff, in the brief presented in her behalf, conceding that the oral contract was within the provisions of the statute of frauds, contends that the finding shows such performance upon her part as relieves the case from the operation of the statute. The adjudications upon the subject of what constitutes sufficient part performance of an oral contract to take it out of the statute are almost numberless. Though not in harmony, they appear to support one or the other of two rules; the stricter, requiring the acts of part performance to be referable to the contract set up, and to no other one, and the more liberal holding the acts sufficient if they are such as clearly refer to some contract in relation to the subject matter in dispute, the terms of which may then be established by parol. We have had occasion very recently to fully ex-

amine the subject, and have adopted the latter and more liberal rule: *Andrew v. Babcock*, 63 Conn. 109, 122.

But, applying the rule, do the acts stated clearly indicate a contract in relation to the subject matter in dispute? We think not. On this point we cannot do better than to quote and adopt the language of the court in the case before cited, of *Shahan v. Swan*, 48 Ohio St. 39, 29 Am. St. Rep. 517, where, in reference to very similar facts, the court said: "Acts of this character are not usually the offspring of contractual relations. Would the ordinary observer infer from them any contract whatever? Would they not, rather, be attributed to higher motives?" "Whether these acts of alleged part performance be taken singly or collectively, they do not indicate that they were done in performance of any contract or agreement respecting property rights of any kind, but rather were manifestations of a benevolent and affectionate disposition ⁵⁴⁰ on the part of a childless couple towards a gentle and affectionate child whose fate was placed in their keeping." So, also, in the case of *Pond v. Sheean*, 132 Ill. 312, a person, having no children of his own, took an infant daughter of a relative of his wife, to raise as a member of his family, and promised orally, with his wife's consent, that if the child's father would permit her to become a member of his family and assume the name of her adopter, he would, on his death and that of his wife, give the child all the property he might own. The contract was fully performed by the child and her father. But the court held that a court of equity could not decree a specific performance of the parol agreement, saying that the case was clearly within the statute of frauds; that the contract was entire, and the plaintiff having never been put into possession of the real estate, the acts of part performance were not sufficient to relieve the case from the statute. So, also, in the Wisconsin case of *Ellis v. Cary*, 74 Wis. 176, 17 Am. St. Rep. 125, where the alleged agreement of the intestate was that if Mrs. Ellis, the plaintiff, his stepdaughter, would keep the house of the deceased and take care of him during the residue of his life, he would devise and bequeath to her all his real and personal property, as compensation for such services. The plaintiff not only fully performed, but after the death of the testator she remained in possession of his real estate. But it was said that she was not put into possession under the void agreement, and that such possession had no necessary reference

thereto; and it was held that the case was not relieved from the operation of the statute.

But a further reason why such a contract as that in question cannot be specifically enforced is that which is stated at great length in the opinion of the court in *Wallace v. Rappleye*, 103 Ill. 229. This was an attempt to establish a verbal contract, alleged to have been made by a putative father, to make his illegitimate child an heir. The court said: 1. That "such claims are always dangerous, and when they rest on parol evidence they should be strictly scanned, especially when an attempt is made, under cover of a parol contract, to effect a distribution different from ⁵⁴¹ that which the law makes."

The court also held that a specific performance of a verbal contract affecting real estate will not be decreed except upon due and conclusive proof of its existence and terms, and that the contract must be certain, equal, and fair, founded upon a valuable, as distinguished from a merely good or moral, consideration; and that when so proven it is not a matter of right, but of sound discretion—general equitable principles concerning the correctness of which there can be no question.

The court in the same case also says: "The only significance of a contract to make one an heir, is in securing a right to property. But what is the amount of property involved in such a contract? How much intestate estate will be left to be inherited? The contract would be uncertain as to the amount of property reached by it." Again, in *Woods v. Evans*, 113 Ill. 186, 55 Am. Rep. 409, it was held that a contract by one having at the time an estate of the value of twenty thousand dollars, and a wife living, but no children, to take, maintain, and educate an orphan girl eleven years old, and, for her services until she should attain the age of eighteen years, to leave and give to her at his death a child's part of his estate, was not based upon a sufficiently adequate consideration; that it was not certain as to what was intended, and not fair and just in all its provisions; that it was too uncertain as to the amount of property to be reached by it, and that it should not be specifically enforced against the heirs of the party making the same: See, also, the cases of *Wall's Appeal*, 111 Pa. St. 460; 56 Am. Rep. 288; *Maddison v. Alderson*, L. R. 8 App. Cas. 467.

The case of *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222, unlike the cases before cited, was an action at law, being

a complaint against an administrator, and based upon a claim against the estate. The facts alleged were, in substance, that a childless husband and wife, in consideration that a young girl should live with them until the death of both, in all respects as their own child, and render such service as she was capable of doing, orally agreed to make her their heir, and at their death, or at the death of the survivor, to will her the entire estate of which they were possessed, which ⁵⁴² in fact consisted, at the death of the survivor, of real estate, and also of personal estate exceeding fifty dollars in value. The claim was to recover the value of the estate, estimated at six thousand dollars. The case was tried to a jury, who returned a verdict for said sum. On appeal, the judgment upon such verdict was reversed, the court holding: 1. That the agreement was within the statute of frauds; 2. That performance on the part of the girl did not take it out of the statute; 3. That where services have been performed in consideration of property to be conveyed, if the contract is not enforceable by reason of the statute of frauds, the action is not on the special contract for damages, but on a *quantum meruit* to recover the value of the services; 4. In such a case the value of the services performed, and not the value of the property agreed to be conveyed, is the measure of damages; 5. In estimating the value of the services regard should be paid to the situation of the parties and the nature of the services required or performed. The court, in the opinion, fully considers all these propositions. We need not add further to what has already been said in reference to the first two, but will quote somewhat in regard to the others. "When the title to property, either real or personal, is to be acquired by purchase, the statute of frauds will operate upon and affect the contract in precisely the same manner, whether the consideration for the purchase is to be paid in services, money, or any thing else. In either case such a contract, being in parol and entirely executory, cannot be enforced by either party, and it may be doubted whether a contract which is within the statute, so as to be incapable of specific enforcement, has sufficient validity to support an action for damages by either party, unless the contract was induced under, or its violation is involved in, some special circumstances of fraud or bad faith: *Barickman v. Kuykendall*, 6 Blackf. 21; *Ballard v. Bond*, 32 Vt. 355; *McCracken v. McCracken*, 88 N. C. 272; *Bender v. Bender*, 37 Pa. St. 419. The most that can be recovered in such

a case is the value of what may have been paid or performed by one party in reliance upon such a contract, ⁵⁴³ when the other refuses to perform: Reed on Statute of Frauds, secs. 737, 761, 762; *Day v. Wilson*, 83 Ind. 463; 43 Am. Rep. 76.

"Where, therefore, services have been performed or money paid in consideration of property to be conveyed, if the contract is not enforceable by reason of the statute of frauds, the action is not on the special contract, but, in the case of services performed, the action is on a *quantum meruit* to recover the value of the services: *Ham v. Goodrich*, 37 N. H. 185; *Emery v. Smith*, 46 N. H. 151; *Leslie v. Smith*, 32 Mich. 64; *Seymour v. Bennet*, 14 Mass. 266; 2 Reed on Statute of Frauds, secs. 622, 623, and cases cited in notes; 2 Sutherland on Damages, 453. In such a case the value of the services performed, and not the value of the property agreed to be conveyed, is the measure of damages." It was also said, referring to the agreement: "It does, however, serve to rebut any presumption which otherwise might have obtained, that the services rendered were to have been gratuitously performed, or that they were performed under the mere expectancy that the intestate would leave the plaintiff's ward a legacy. She is, therefore, entitled to recover the value of her services: *Jacobson v. Le Grange*, 3 Johns. 199; *Robinson v. Raynor*, 28 N. Y. 494; *Campbell v. Campbell*, 65 Barb. 639; *Reynolds v. Robinson*, 64 N. Y. 589; *Emery v. Smith*, 46 N. H. 151; *Sutton v. Rowley*, 44 Mich. 112; *Welch v. Lawson*, 32 Miss. 170; 66 Am. Dec. 606; *Bender v. Bender*, 37 Pa. St. 419; *Maddison v. Alderson*, L. R. 8 App. Cas. 467; *Clark v. Davidson*, 53 Wis. 317; *Howard v. Brower*, 37 Ohio St. 402; Wood on Frauds, secs. 221, 235. Many other cases might be cited which support and illustrate the conclusions reached, but those referred to are deemed sufficient. The value of the services is to be determined without any reference to the value of the estate of the intestate. But, in estimating the value of the services, regard should be paid to the situation of the parties, the nature of the service required or performed. Allowance should be made, too, for the fact that under the circumstances the presence and society of the plaintiff's ward ⁵⁴⁴ may have been of sufficient value to compensate for her education, clothing, and support."

We have quoted from the above case, which has been expressly approved in the more recent and similar case of *Ellis v. Cary*, 74 Wis. 176, 17 Am. St. Rep. 125, so much at length

because the language used appears to us to present with great clearness and force, and supported by an abundant reference to authority, principles applicable to the questions under consideration, which have been already recognized in the decisions of this court, and to be in full accord with such decisions: *Watertown Eccl. Soc. Appeal*, 46 Conn. 230; *Starkey's Appeal*, 61 Conn. 199; *Donahus's Appeal*, 62 Conn. 370.

But perhaps these principles, though apparent from the opinions in the cases just cited, are most clearly stated in *Wainwright v. Talcott*, 60 Conn. 43. That was an action to recover for money expended by the plaintiff in improvements on real estate owned in common by the plaintiff's wife and the defendant's testator, made under a promise of the latter that his interest in the property should be devised to the plaintiff's wife, and that she should have the benefit of the improvements. As there declared, the rule is this: Damages, in such a case, are not recoverable for the breach of an agreement impossible to enforce, and unnecessary to allege; but on the ground of what, for want of a better name, is called a constructive fraud, which would be consummated unless the plaintiff was allowed to prove what induced her to alter her situation, if she did alter it, for the worse, and could upon such proof obtain fair compensation for the injury thereby occasioned to her. "The cause of action in such cases is not the refusal to perform a contract, or to keep a promise or engagement upon which another relied, but it is the consequent unjust infliction of loss or injury upon one party, and the consequent benefit and advantage resulting to the other, from the violation or breach of a faith and confidence which, under the circumstances, a court of equity deems to have been rightly reposed in him."

A claim for such damages is properly presentable to an ⁵⁴⁵ administrator, or to commissioners.

Under the common-law system of pleading, the action of *indebitatus assumpsit* would have been an appropriate form of remedy for recovery. The damages are capable of computation, since they are to be measured by the pecuniary loss and injury on the one side, and the pecuniary benefit and advantage on the other. Such a claim was presented in *Starkey's Appeal*, 61 Conn. 199. And though one of the forms of double presentation there employed might seem to be a claim for damages for breach of contract to leave all the property and estate of the intestate to the plaintiff, by will, this court, in its opinion, says that it was "evident that the commissioners

considered that there was but one claim for six thousand dollars, founded on personal services, and that they allowed." And in reference to such claim, it was, by the court, made a question whether evidence as to the value of the estate was admissible, and it was said: "That seems to be more remote than the other testimony; but perhaps in connection with the testimony of Mrs. Rice it was admissible, not as giving a rule of damages, but as having some tendency to show Mr. Brooks' appreciation of her services." And, finally, in that case, upon the question of the true rule of damages, the charge to the jury was approved, in which it was stated that: "When services are rendered by one person to another in pursuance of a mutual understanding and agreement between the parties that compensation for them should be made by will, and the party receiving the services dies without making the expected compensation, the party rendering the services is entitled to compensation out of the estate of the deceased as a creditor for the value of such services."

But can there be a recovery of damages in this action? The complaint as it stands is not adapted to such recovery. It contains no statement of any resulting loss or damage to the plaintiff, and none of services rendered, except that she nursed "the intestate and his wife, in their sickness, dutiful as a daughter"; and no bill of particulars was filed. Since, however, the case comes before us on reservation, if it appeared probable the plaintiff was entitled to such relief we ⁵⁴⁶ might suggest proper amendment, pursuant to the provisions of the rules of practice: 58 Conn., 568, 569, secs. 2, 3; *Erichson v. Beach*, 40 Conn. 283; *Haussman v. Burnham*, 59 Conn. 117, 139; 21 Am. St. Rep. 74; *Logiodice v. Gannon*, 60 Conn. 81, 85. But to this course, if advised, it is probable an insurmountable obstacle would exist. There is nothing in the complaint which indicates that any claim against the estate has ever been presented to the administratrix, as required by General Statutes, section 581. And unless the fact that it has been presented exists, and could therefore be stated, any amendment would fail to make a valid complaint, adapted to the recovery of a claim. Such presentation is essential, and a condition precedent to legal recovery against an insolvent estate. The object of the statute making it requisite is apparent: It is "to enable the administrator to perform his duties. . . . In the first instance the administrator must pass upon all claims against such estates. He is not pre-

sumed to know what they are, and in a great majority of cases he cannot know, until they are presented to him by the creditors": *Pike v. Thorp*, 44 Conn. 453. The law, therefore, has made it as essential to a claimant's right of recovery of a legal claim, in a higher court, against a solvent estate, that it should be first presented to the executor or administrator, and an opportunity given him to examine and pass upon it, and to allow or disallow it, as it is that such a claim against an estate represented insolvent should be presented to the commissioners upon such estate for their action.

There is another statute, General Statutes, section 588, which requires suit to be brought by a creditor of an estate, against an administrator, within four months after written notice of the disallowance of a claim. Otherwise it is barred. Both of these provisions have long been in existence in this state. Doubtless, prior to the passage of the Practice Act of 1879, a custom had grown up, to some extent, of treating both alike, as matters, the failure to comply with which should be set up in defense under the general issue with notice. But there is a radical difference between the two provisions, the last being simply a statute of limitations. The practical ⁵⁴⁷ effect of this difference was clearly recognized in the rules and forms under the Practice Act: See Practice Act Book, page 16, section 6, rules of practice (58 Conn. 566, 567), which requires statutes of limitations to be specially pleaded; and same book, page 72, form 106, where a complaint against an administrator which contains (par. 10) the allegation of presentation of the claim to the administrator, and his refusal to pay the same.

But the question before us is not strictly one of pleading, or whether a complaint without such allegation of presentation would be good upon demurrer. The facts have been found by a committee apparently with the utmost fullness, for certainly the finding contains considerable that is unimportant and immaterial. But there is no finding of presentation of any claim to the administratrix. The precise question, therefore, arises, which was presented and passed upon by this court in *Brown v. Brown*, 56 Conn. 249, 7 Am. St. Rep. 307, where an appeal having been taken in consequence of the refusal of the court below to set aside a nonsuit granted, the sole question presented and decided was whether the plaintiff in its testimony in chief had produced sufficient evidence of presentation to constitute a *prima facie* case. The distinction

between the two statutes to which we have referred is clearly stated in the opinion, page 252, the court saying: "The question whether the suit was brought within four months after notice of the rejection of the claim by the executors is one that does not arise in the case as it stands. It is wholly a matter of defense, and constituted no part of the plaintiff's case. We do not think it proper at this stage of the case to give the question any consideration."

But to all the foregoing it may be added that all the allegations of the complaint and the relief prayed for therein, tend strongly in opposition to the idea of any presentation of any claim against the estate to the administratrix. The prayer of the plaintiff, upon the facts stated and found, as before recited, is: "1. That you will pass a decree that when said estate is settled, and the distributive share to be set to the widow is ascertained, the remainder of said estate shall be paid over to this plaintiff by the administratrix; ⁵⁴⁸ 2. In other words, the plaintiff asks for a decree that the promises of the said William Grant shall be specifically performed, or rather, that the plaintiff shall be placed in as good condition as she would have been in if said promises had been performed; 3. In the event that the plaintiff shall not be entitled to the equitable decree prayed for, then she claims a judgment for damages for five thousand dollars." Now it is clear that the first two of these paragraphs neither contain any demand for legal relief or for any claim against the estate upon which the administratrix could pass, allowing or disallowing the same, or upon which if, under the provisions of the General Statutes, section 585, the administratrix, after the time limited for presenting claims, had procured the appointment of commissioners, such commissioners, although vested with powers both legal and equitable, could have decided, for even their equitable powers are limited to cases where the claims are those of creditors of the estate, entitled to payment out of the assets, which the plaintiff did not claim to be, but entitled to receive its remaining assets after the payment of the debts and charges, alleged in the complaint not to exceed one thousand dollars; the expense of settling the estate alleged not to exceed two hundred dollars and the dower and distributive share of the widow. The powers which even commissioners could exercise must be such as the superior court, on appeal, could also exercise, through the instrumentality of a trial by jury—such a case as that presented in *Watertown Eccl. Soc.*

Appeal, 46 Conn. 230; *Starkey's Appeal*, 61 Conn. 199; and in *Corr's Appeal*, 62 Conn. 403, and cases cited.

And so far as the claim in the third paragraph of the demand for relief is concerned it must be noticed 1. That it is not asked for absolutely, but only in the event that the plaintiff is held not entitled to what she has demanded absolutely, so that it can scarce be imagined that such alternative claim could have been presented as the absolute one to the administratrix; and 2. Such claim for damages must be understood as being the equitable relief prayed for in another form, which in the opinion of the pleader might ⁵⁴⁹ perhaps be held less objectionable (though we do not share such opinion) than the former, as, for instance, the conversion of the entire estate into money, subject to the widow's dower in the realty, and the payment over to the plaintiff of the residue, after discharge of the debts, charges, expenses, and setting out of the widow's portion, as aforesaid.

Even if it be imagined that relief by way of damages for breach of contract was intended, it would amount to precisely the same thing. For, waiving the consideration already advanced, based upon the clear provisions of the statute of frauds, which would make such a contract of no legal validity (*Donahue's Appeal*, 62 Conn. 370), it would be impossible to fix the amount of such damages, prior to the final completion of the settlement of the estate; and no jury could legitimately determine such amount, and no court, through the form of a judgment at law, as for a liquidated and definite sum, could grant the plaintiff such relief. It would only be through the more flexible and adaptable remedies pertaining to the equitable jurisdiction that the result sought could be attained. That the plaintiff, although including a demand for damages in the complaint, has not contemplated such recovery for a fixed sum, as damages, for breach of contract, is manifest; for not only is no claim therefor made in the brief presented to us in her behalf, but the committee, although making, as we have before stated, at her request, a finding of facts not based upon any allegations of the complaint, has nowhere made any such finding as would enable the court, even approximately, to fix the amount of such judgment. The value of the real estate, and of the entire property, is indeed approximately found, but there is no statement or suggestion as to the clear estate which would remain after the payment of debts, charges, and expenses; for which omission there

can probably be no better reason than the one already given, that an accurate statement in regard to the matter, at the present time, would, by reason of necessary contingencies, be impracticable.

And, finally, notwithstanding the finding of the committee, as to the value of the plaintiff's services, made at her ⁵⁵⁰ request, the plaintiff, in her brief, has advanced no claim for any recovery of that character, and to that extent. The only relief which in such brief is asked for is that quoted by us, in the early part of this opinion, and the ground upon which such relief is claimed is, that "specific performance will be decreed, where the damages afforded by law are inadequate," it being stated that, in this case, the services rendered were of such a character that it is impossible to estimate their value to the promisor by any pecuniary standard; and that it is evident that the intestate did not intend to measure them by any such standard, and that it was impossible to compensate the plaintiff in damages. And also upon the further grounds that "specific performance will be decreed where there is an impossibility of ascertaining damages," and where "one has performed, and nonperformance by the other operates as a fraud upon the one performing." It may, therefore, seem as if, in the consideration of the question as to whether the plaintiff, in this action, can recover damages (as based upon a claim, and by way of legal relief), we have performed a work of supererogation. We have, however, deemed it best to examine it, both on account of its intrinsic interest and because the case itself, upon the facts found by the committee, presents such strong features in favor of the right of the plaintiff to such compensation, as, consistent with the rules of law, may be awarded to her; which it may not yet be too late to obtain through proper presentation of a proper claim, if, as we assume, such claim has not been presented to the administratrix.

The case is remanded to the superior court, which court is advised that if the plaintiff will undertake to allege and prove a due presentation of a proper claim against the estate, to the administratrix, prior to the bringing of her action, the court in its discretion may allow the amendment and such further amendment, or substituted complaint, and further hearing thereon, as in its judgment may be necessary to properly present the plaintiff's case; and thereupon render judgment in her favor for such sum, if any, as she shall, by said court, be

found entitled to recover. But upon the ⁵⁵¹ complaint as it now stands, and unless the same can be so amended, judgment must be rendered in favor of the defendant.

In this opinion the other judges concurred.

STATUTE OF FRAUDS—EFFECT OF PART PERFORMANCE TO TAKE CONTRACT OUT OF.—Part performance of a parol agreement is sufficient to take a case out of the statute of frauds: *Ryan v. Dox*, 34 N. Y. 307; 90 Am. Dec. 696, and note; *Johnson v. Hubbell*, 11 N. J. Eq. 332; 66 Am. Dec. 773, and note; *Wynn v. Garland*, 19 Ark. 23; 68 Am. Dec. 190, and note; *Webster v. Le Compte*, 74 Md. 249; *Aiken v. Nogle*, 47 Kan. 96; *Hinkle v. Hinkle*, 55 Ark. 583; *Manning v. Frunklin*, 81 Cal. 205. Part performance will take a parol contract out of the statute of frauds where the parties cannot be restored to the positions in which they stood before making the contract: *Robbins v. McKnight*, 5 N. J. Eq. 642; 45 Am. Dec. 406, and note; *Hays v. Hall*, 4 Port. 374; 30 Am. Dec. 530. The acts of part performance which will take a parol contract out of the statute of frauds must be referable to, and in part execution of, the contract, and not referable to some other title, and must be prejudicial to the party claiming specific performance: *Cutler v. Babcock*, 81 Wis. 195; 29 Am. St. Rep. 882; *Shahan v. Swan*, 48 Ohio St. 25; 29 Am. St. Rep. 517, and note. See, also, the notes to *Peck v. Peck*, 11 Am. St. Rep. 250; *Poland v. O'Connor*, 93 Am. Dec. 330, and the extended note to *Christy v. Barnhart*, 53 Am. Dec. 540. A part performance of a verbal contract within the statute of frauds has no effect at law, to take the case out of the operation of the statute; the doctrine of part performance is one of equity: *Dougherty v. Catlett*, 129 Ill. 431; extended note to *Norton v. Preston*, 32 Am. Dec. 129.

STATUTE OF FRAUDS.—PART PERFORMANCE of a parol contract to render services as a consideration for the devise of property renders the agreement enforceable: *Carmichael v. Carmichael*, 72 Mich. 76; 16 Am. St. Rep. 528, and note. See, also, *Pflugar v. Pullz*, 43 N. J. Eq. 440.

WILLS—AGREEMENTS TO MAKE—DAMAGES.—Where there is an express agreement between a father and son that the father will devise the home place to the son if the son will attend to and take care of him for life, and the son performs his part of the contract, he is entitled to recover upon a *quantum meruit* for his services, if the father's part of the contract is unperformed: *Hudson v. Hudson*, 87 Ga. 678; 27 Am. St. Rep. 270. A contract to make a will may be enforced, and if not performed a recovery may be had for its violation: *Huguley v. Lanier*, 86 Ga. 636; 22 Am. St. Rep. 487, and note; *Manning v. Pippen*, 86 Ala. 357; 11 Am. St. Rep. 46, and note. See the extended notes to *Johnson v. Hubbell*, 66 Am. Dec. 784; *Hawkins v. Ball*, 68 Am. Dec. 759, and the note to *Carmichael v. Carmichael*, 16 Am. St. Rep. 534.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

PUTNAM v. GLIDDEN.

[159 MASSACHUSETTS, 47.]

VENDOR AND VENDEE.—THE EXPENSES OF KEEPING PERSONAL PROPERTY which the vendee refuses to receive cannot, after an action has been sustained to recover the entire contract price, be recovered in a second action brought by the vendor against the vendee.

ACTION to recover for keeping a pair of horses from January 16, 1890, to October 17, 1891. The plaintiff, at the date first named, sold the horses to the defendant, but the latter refused to receive them, claiming that one of them was unsound. On January 17, 1890, the plaintiff brought an action against the defendant for the purchase price of the horses, and in September, 1891, a judgment was entered in plaintiff's favor for such price. On October 17, 1891, the defendant called for and took away the horses. They had not been used by the plaintiff during the time he thus kept them for the defendant, and this action was therefore brought to recover the value of their keeping.

J. C. Burke, for the defendant.

F. W. Qua, for the plaintiff.

49 KNOWLTON, J. On the agreed statement of facts in this case the question is whether the law implies a contract on the part of the defendant to pay for the keeping of the horses. The burden of proof is on the plaintiff, and no inferences of fact can be drawn in his favor: *Old Colony R. R. Co. v. Wilder*, 137 Mass. 536.

It has been said that when a vendee returns or declines to receive property sold him, the vendor has his choice "of either one of three methods to indemnify himself: 1. He may store or retain the property for the vendee, and sue him for the entire purchase price; 2. He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or 3. He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price": *Dustan v. McAndrew*, 44 N. Y. 72, 78; *Haines v. Tucker*, 50 N. H. 307; *Girard v. Taggart*, 5 Serg. & R. 19; 9 Am. Dec. 327; *Rosenbaum v. Weeden*, 18 Gratt. 785; 98 Am. Dec. 737; *Holland v. Rea*, 48 Mich. 218, 224; *Cook v. Brandeis*, 3 Met. (Ky.) 555; *Bagley v. Findlay*, 82 Ill. 524.

Where the vendee contends that the property is not his, and treats it as belonging to the vendor, and the vendor elects to keep it for the vendee and sue for the entire contract price, there is no implied contract on the part of the vendee to pay the vendor the expense of keeping it: *Whiting v. Sullivan*, 7 Mass. 107; *Earle v. Coburn*, 130 Mass. 596. In such cases, when there is a controversy about the title, the election of the vendor to take care of the property is often more for his own benefit, in view of the risk that the main question in dispute may be decided against him, than for the benefit of the vendee, and the attitude of the vendee is equivalent to an express prohibition of the keeping on his account and at his expense. If the vendor wishes to avoid the expense of keeping, and at the same time to avail himself of the value of, the property he may sell under an implied agency for the vendee, and sue for the balance above what he obtains after paying the reasonable expenses.

In the present case the plaintiff elected to sue for the entire contract price, and, in the opinion of a majority of the court, there is no principle of law which permits him now to maintain a second suit for the expense of keeping the horses, either during the whole time while the litigation was pending or for that part of it which would have been required to enable him properly to dispose of the horses if he had chosen to sell them on the defendant's account, and after applying the proceeds, to sue for the balance due him.

Judgment for the defendant.

SALES—BUYER'S REFUSAL TO ACCEPT—SELLER'S RIGHTS.—If a buyer refuses to fulfill his contract, the vendor may resell the goods without any notice to him, and look to him for any loss he may have sustained by reason of the refusal: *West v. Cunningham*, 9 Port. 104; 33 Am. Dec. 300, and note; *Atwood v. Lucas*, 53 Me. 508; 89 Am. Dec. 713, and note; *Rosenbaum v. Weeden*, 18 Gratt. 785; 98 Am. Dec. 737; *Patten's Appeal*, 45 Pa. St. 151; 84 Am. Dec. 479; *Coffman v. Hampton*, 2 Watts & S. 377; 37 Am. Dec. 511, and note; note to *Waples v. Overaker*, 77 Tex. 7; 19 Am. St. Rep. 727. In *West v. Anderson*, 9 Conn. 107, 21 Am. Dec. 737, it was held that damages for keeping a horse before plaintiff's offer to return him cannot be recovered in an action for false affirmation.

MOODY v. HAMILTON MANUFACTURING CO.

[150 MASSACHUSETTS, 70.]

MASTER AND SERVANT.—A MASTER IS NOT RESPONSIBLE FOR THE NEGLIGENCE OF HIS SUPERIOR SERVANT in giving orders whereby injury is sustained by an inferior servant.

ACTION to recover for injuries sustained by plaintiff when in the defendant's employment as a laborer, on account of plaintiff's having obeyed a negligent order given by defendant's foreman whereby plaintiff was directed to remove a carboy of vitriol, the contents of which were spilled over him and his eyes destroyed.

P. J. Hoar, for the plaintiff.

G. F. Richardson and G. R. Richardson and D. M. Richardson, for the defendant.

72 LATHROP, J. There is no evidence in this case of any negligence on the part of the defendant in respect to its selection of a competent overseer and competent servants. So far as the evidence shows negligence on the part of any one it is on the part of one Garner, who was the defendant's yardmaster, and who exercised authority over the plaintiff, who was a yardman.

While there is a conflict of authority in this country on the subject, the rule is well established in this commonwealth that the fact that one servant has control over another is immaterial, and that a master is not responsible, at common law, for the negligence of a superior servant, even in giving orders, whereby injury is sustained by an inferior servant.

In *Rogers v. Ludlow Mfg. Co.* 144 Mass. 198, 203, 59 Am. Rep. 58, it is said by Mr. Justice Field: "It is settled in this

commonwealth that all servants employed by the same master in a common service are fellow-servants, whatever may be their grade or rank."

The following cases illustrate the rule that a master is not liable to an inferior servant for the negligent act of a superior servant. *Hodgkins v. Eastern R. R. Co.* 119 Mass. 419, a case of a brakeman and station agent. *Walker v. Boston etc. R. R. Co.*, 128 Mass. 8, a case of a laborer and roadmaster. The same rule applies where the superior servant is the foreman of a contractor, and the inferior servant a laborer: *Summerell v. Fish*, 117 Mass. 312; *O'Connor v. Roberts*, 120 Mass. 227, 228; *McKinnon v. Norcross*, 148 Mass. 533. Or the superintendent: *Zeigler v. Day*, 123 Mass. 152; *Floyd v. Sugden*, 134 Mass. 563.

A negligent order falls within the same rule, whether given to the servant injured or to another servant whose act in obedience to the order causes the injury.

Thus in *Albro v. Agawam Canal Co.*, 6 Cush. 75, a corporation was held not to be liable to a spinner in its employ by the negligent order to a third person of its superintendent, who had the general supervision and charge of its establishment.

In *Benson v. Goodwin*, 147 Mass. 237, the owners of a vessel were held not to be liable for a negligent order given by the mate to one sailor, whereby another sailor was injured.

In *Duffy v. Upton*, 113 Mass. 544, workmen were raising a piece of timber by a derrick, when, the timber meeting with an unlooked for check, the foreman cried out, "Give another hoist and take it up." They did so, the derrick broke, and one of the workmen was injured. The employer was held not to be liable.

In *Flynn v. Salem*, 134 Mass. 351, the plaintiff, a laborer, was employed by the defendant to assist in digging a trench. He was injured by the caving in of the sides of the trench. The declaration alleged as the act of negligence that the superintendent of the work directed the plaintiff to dig in the trench when it was dangerous to do so, and when the superintendent knew that it was dangerous. A demurrer to the declaration was sustained, on the ground that the only negligence alleged was that of a fellow-servant with the plaintiff.

There is nothing in the case of *Patnode v. Warren Cotton Mills*, 157 Mass. 283, 34 Am. St. Rep. 275, which conflicts with this well-settled doctrine, or which was intended by the

court to countenance the view which prevails in some jurisdictions, that a superior servant is a vice-principal or an *alter ego*. The plaintiff in *Patnode v. Warren Cotton Mills*, 157 Mass. 283, 34 Am. St. Rep. 275, was a boy of fourteen, who was set to work on a dangerous machine by one McKeon, without receiving proper instructions. There was a conflict of evidence on the question whether McKeon had authority to direct the plaintiff to work on the machine, and whether the plaintiff was not a volunteer. The remarks of the court are directed to this question.

The question of the effect of a negligent order given by a superior servant to an inferior servant upon the liability of the master was not argued by counsel in that case nor considered by the court.

Exceptions overruled.

MASTER AND SERVANT—MASTER WHEN NOT LIABLE TO SERVANT FOR NEGLIGENCE OF SUPERIOR SERVANT.—The liability of a master who has not been guilty of any negligence or breach of duty in the employment of his servants, for an injury to such servants, caused by the negligence of another engaged in the same business, depends, not upon the rank or grade of either servant, but upon the character of the act in the performance of which the injury is inflicted; and he is not liable unless the negligent act pertained to a matter in relation to which he owed a duty to the servant injured: *Dwyer v. American Express Co.*, 82 Wis. 307; 33 Am. St. Rep. 44, and note; *Davis v. Southern Pac. Co.*, 98 Cal. 19; 35 Am. St. Rep. 133, and note.

UNION FREIGHT RAILROAD CO. v. WINKLEY.

[159 MASSACHUSETTS, 188.]

CARRIERS—FREIGHT, WHO ANSWERABLE FOR.—When a vendor of goods delivers them to a railway corporation to be carried to the purchaser, although the title passes by such delivery, and the name and address of the consignee who is also the purchaser, is known to the corporation, the vendor is presumed to make the contract for the transportation and to be liable for the payment of the freight. But this presumption may be rebutted, and if the vendee has ordered the goods to be consigned at his risk and on his account, and the freight charges are made to him and bills for freight sent to him, these facts are evidence proper for the consideration of the jury, who must be left to determine as a matter of fact whether the contract for transportation was made with the vendor or the vendee and to impose liability accordingly.

ACTION to recover freight for the transportation of ice. The defendants had sold the ice to one Merrick, and loaded it on a car, which they left on the track, informing the carrier's

agent that the car was for N. M. Merrick, Plympton, Massachusetts. The carrier thereupon took the car, and transported it to Merrick, who received delivery thereof, and to whom bills for freight were sent, and of whom their payment was demanded.

C. F. Choate, Jr., for the plaintiff.

W. E. Jewell, for the defendants.

¹³⁴ FIELD, C. J. The plaintiff is the second in a line of three connecting railroads over which the ice was transported, and the freight due to the first two roads has been paid by the last. We assume, without deciding it, that the right of the plaintiff to maintain this action is the same as if it were the first road, and the freight had not been paid. With whom, then, did the Boston and Maine Railroad make the contract for the transportation, and who promised that company to pay the freight? There was no express contract. The defendants, through their servants, might have contracted with the railroad to pay the freight, although as between themselves and Merrick he was bound to ¹³⁵ pay it, but they made no such contract in terms. A consignor of merchandise delivered to a railroad for transportation may be the owner and act for himself, or may be an agent for the owner and act for him, and this may or may not be known to the railroad company. In the present case the railroad company knew the name and residence of the consignee.

From the agreed facts, it appears that the title to the ice passed to Merrick when it was put on board the car, and that it was transported at his risk. The doctrine of the courts of the United States seems to be that the property in goods shipped is presumably in the consignee, although this presumption may be rebutted by proof: *Lawrence v. Minturn*, 17 How. 100; *Blum v. The Caddo*, 1 Woods, 64. In Dicey on Parties to Actions, 87, 88, the result of the English decisions is stated to be as follows: "The contract for carriage is, in the absence of any express agreement, presumed to be between the carrier and the person at whose risk the goods are carried, i. e., the person whose goods they are, and who would suffer if the goods were lost. . . . When, therefore, goods are sent to a person who has purchased them, or are shipped under a bill of lading by a person's order, and on his account, the consignee, as being the person at whose risk the goods are, is considered the person with whom the contract is made.

He is liable to pay for the carriage, and is the proper person to sue the carrier for a breach of contract." And on page 90, note, "Where the consignor acts as agent of the consignee, but contracts in his own name, it would appear that either the consignor or the consignee may sue": *Dawes v. Peck*, 8 Term Rep. 330; *Domett v. Beckford*, 5 Barn. & Adol. 521; *Coombs v. Bristol etc. Ry. Co.*, 3 Hurl. & N. 1; *Sargent v. Morris*, 3 Barn. & Ald. 277; *Dunlop v. Lambert*, 6 Clark & F. 600; *Great Western Ry. Co. v. Bagge*, 15 Q. B. D. 625; *Cork Distilleries Co. v. Great Southern etc. Ry. Co.*, L. R. 7 H. L. 269. The cases generally are collected in Hutchinson on Carriers, secs. 448, et seq., 720, et seq. Most of the English cases were reviewed in *Blanchard v. Page*, 8 Gray, 281. That was a case of the carriage of goods by sea under a bill of lading, and it was held that the bill of lading was a contract between the shipper and the shipowner, and that, although it was shown that the shipper acted as agent of the consignees, who had bought and ¹⁸⁶ paid for the goods before shipment, yet he could bring an action in his own name for breach of the contract of carriage unless he was prohibited by his principal, and it was said that he would be liable for the freight. In *Wooster v. Tarr*, 8 Allen, 270, 85 Am. Dec. 707, it was decided that under a bill of lading in the usual form the shipper was liable to the carrier for the freight, although the bill contained the usual clause that the goods were to be delivered to the consignees or their assignees, "he or they paying freight for said goods," etc. It was said "to be the settled doctrine that a bill of lading is a written simple contract between a shipper of goods and a shipowner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed." Both these cases were upon express contracts.

The strongest case for the plaintiff is *Finn v. Western R. R. Co.*, 102 Mass. 283, which was upon an implied contract. In that case, one Clark had ordered shingles of Finn, who shipped them on his own account, under a bill of lading, on board a canal-boat, to be delivered to "the Great Western Railroad Company or their assignees at Greenbush, New York. Consignee to pay freight on the delivery." The shingles arrived by boat at the freight station of the railroad company at Greenbush, New York, and were described in the bill of lading as marked "J. S. C. extra," or "J. S. C." They were intended to be transported to Joseph S. Clark, Southampton, Massachusetts, and were burned while in the freight house by an acci-

dental fire. Clark accepted and paid a draft drawn by Finn for the shingles, and, in a suit by Finn against him, pleaded the amount of the draft in setoff, and recovered the amount, on the ground that "the omission of the plaintiff [Finn] to forward the goods with proper directions as to the consignee and the place of delivery authorized the defendant [Clark] to treat the alleged sale as one never perfected, and to recover back the money paid upon the draft": *Finn v. Clark*, 10 Allen, 479; 12 Allen, 522. Finn then brought suit against the railroad company for its failure to forward and deliver the shingles to Clark. It was held that, although the case of Finn against Clark settled the fact that as between them the title to the property remained in Finn, yet the railroad company not being a party to that suit, could not set up the judgment in it "as an estoppel against ¹⁸⁷ Finn, upon the question of such delivery": *Finn v. Western R. R. Co.*, 102 Mass. 283. At the second trial the plaintiff obtained a verdict, and the facts stated in the exceptions showed "that the title to the property had passed to Clark before the loss occurred, leaving in Finn at most only a right of stoppage *in transitu*," and it was in this aspect of the case that the opinion in *Finn v. Western R. R. Co.*, 112 Mass. 524, 17 Am. Rep. 128, was delivered. The contention of the plaintiff was, that the shingles had been delivered to the railroad company, with proper directions for their transportation, and that the defendant has neglected to transport them, whereby they had been burned.

In the opinion the court says of the liability of a common carrier: "*Prima facie*, his contract of service is with the party from whom, directly or indirectly, he receives the goods for carriage; that is, with the consignor. . . . When carrying goods from seller to purchaser, if there is nothing in the relations of the several parties except what arises from the fact that the seller commits the goods to the carrier as the ordinary and convenient mode of transmission and delivery, in execution of the order or agreement of sale, the employment is by the seller, the contract of service is with him, and actions based upon that contract may, if they must not necessarily, be in the name of the consignor. If, however, the purchaser designates the carrier, making him his agent to receive and transmit the goods, or if the sale is complete before delivery to the carrier, and the seller is made the agent of the purchaser in respect to the forwarding of them, a dif-

ferent implication would arise, and the contract of service might be held to be with the purchaser." Although this was not a suit to recover freight, the principles on which it was decided are applicable to such a suit, and the effect of this and the previous decisions, we think, is that in this commonwealth, when the vendor of goods delivers them to a railroad to be carried to the purchaser, although the title passes to the purchaser by the delivery to the railroad company, and the name and address of the consignee who is the purchaser is known to the company, the vendor is presumed to make the contract for transportation with the company on his own behalf, and is held liable to the company for the payment of the freight. This presumption, however, is a disputable one, and may be rebutted or disproved by evidence; and if the vendee has ¹³³ ordered the goods to be sent at his risk and on his account, he also may be held liable, as the real principal in the contract: See *Byington v. Simpson*, 134 Mass. 169; 45 Am. Rep. 314. But whether the presumption be one way or the other, it is a matter of inference from the particular circumstances of the case, and the question which is always to be considered is the understanding of the parties: See *Boston etc. R. R. Co. v. Whitcher*, 1 Allen, 497.

In the present case there was no bill of lading or receipt signed by the railroad company and accepted by the defendants. There was a waybill, but it does not appear that the names of the defendants were in it. The freight charges were made in every instance to Merrick, the consignee, and the bills for freight were sent to him. These facts, and perhaps some others stated in the agreed facts, afford some evidence that the railroad company understood that Merrick was to pay the freight to the company. Upon an agreed statement of facts this court cannot draw inferences of fact, unless they are necessary inferences: *Old Colony R. R. Co. v. Wilder*, 137 Mass. 536. The agreed facts in this case, we think, contain some evidence that the understanding of all the parties was that Merrick should pay the freight to the railroad company, and we cannot hold, as matter of law, that the defendants made a contract on their own behalf to pay the freight.

Judgment affirmed.

CARRIERS—WHO LIABLE FOR FREIGHT.—A consignor is originally liable for freight on goods shipped by him under contract, or for his benefit, and an insertion in the bill of lading of a stipulation for delivery to the consignee, "he or they paying freight" does not relieve the consignor: *Holt v. Westcott*,

43 Me. 445; 69 Am. Dec. 74, and note; *Barker v. Havens*, 17 Johns. 234; 8 Am. Dec. 393, and note. The shipper named in the bill of lading is liable to the carrier for freight, though he does not own the goods and the carrier has waived his lien upon them: *Wooster v. Turr*, 8 Allen, 270; 85 Am. Dec. 707, and note; *Grant v. Wood*, 21 N. J. L. 292; 47 Am. Dec. 162, and note. A carrier is not bound to look to any one but the consignor for his freight charges: *Hayward v. Middleton*, 3 McCord, 121; 15 Am. Dec. 615. Carriers may advance to the forwarding agent of goods the existing charges upon them, and the consignees and owners are liable to refund the same: *White v. Fann*, 6 Humph. 70; 44 Am. Dec. 294.

SLY v. HUNT.

[159 MASSACHUSETTS, 151.]

AN ESTOPPEL IS NOT CONFINED TO A JUDGMENT, BUT EXTENDS TO ALL FACTS INVOLVED in it as necessary steps or the groundwork upon which it must have been founded.

RES JUDICATA.—A DECISION UPON A CONTEST OF A WILL that the testator was of sound and disposing mind at a particular time is conclusive of that question in a subsequent controversy between the same parties in which the same issue is again involved.

ACTION to recover for services alleged to have been rendered by the plaintiff to defendant's testatrix. Upon the trial of the action the mental condition of the testatrix was sought to be made an issue, and the defendant introduced in evidence the proceedings and decision in the matter of the contest of the will of such testatrix, in which she had been found to be of sound mind. The trial court held this decision to be conclusive of the same issue in this case. Verdict and judgment for the plaintiff.

J. Brown and R. C. Brown, for the plaintiff.

H. J. Fuller, for the defendant.

152 LATHROP, J. The physical condition of Mrs. Wilmarth from 1885 down to the time of making her will, in October, 1886, and afterwards, was an issue in this case. The defendant put in evidence, without objection, the record of the probate of her will, which had been contested by the plaintiff and tried by a jury. It appeared from this record that the jury found that Mrs. Wilmarth was of sound and disposing mind and memory at the time of signing the will. The judge ruled in effect that the record of the case was conclusive, as between the plaintiff and the defendant, that Mrs. Wilmarth was at the time of making the will of sound

and disposing mind and memory, so far as making a will was concerned. The correctness of this ruling is the only question open on this exception.

In *Brigham v. Fayerweather*, 140 Mass. 411, the executor of the will of Azubah Brigham brought a bill in equity to have a mortgage deed, executed by said Azubah on June 15, 1882, declared void on the ground that he was not of sufficient mental capacity to execute the deed. The defendant offered in evidence the probate of the will of Azubah, executed by him on October 11, 1882, with evidence that his mental capacity was no less on ¹⁵³ June 15, 1882, than on October 11, 1882. This evidence was excluded; and this court held that it was rightly excluded.

That case differs from the one at bar in this particular: The defendants in that case were not parties to the probate of the will, in the sense that they were entitled to be heard or to take an appeal. In the case at bar, the plaintiff and the defendant were parties to the proceeding in the probate court.

The question how far a verdict and judgment are conclusive between the parties and their privies was considered at length by this court in *Burlen v. Shannon*, 99 Mass. 200, 203; 96 Am. Dec. 733. Mr. Justice Foster, in delivering the opinion of the court, states the rule thus: "A verdict and judgment are conclusive by way of estoppel only as to those facts which were necessarily involved in them, without the existence and proof, or admission of which such a verdict and judgment could not have been rendered. An estoppel is an admission or determination under circumstances of such solemnity that the law will not allow the fact so admitted or established to be afterwards drawn in question between the same parties or their privies. . . . When a fact has been once determined in the course of a judicial proceeding, and a final judgment has been rendered in accordance therewith, it cannot be again litigated between the same parties without virtually impeaching the correctness of the former decision, which, from motives of public policy, the law does not permit to be done. The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or the groundwork upon which it must have been founded": See, also, *Morse v. Elms*, 131 Mass. 151, 152; *Barrs v. Jackson*, 1 Phill. Ch. 582, reversing 1 Younge & C. Ch. 585; *Doglioni v. Crispin*, L. R. 1 H. L. 301, 311, 314; *Spencer v. Williams*,

L. R. 2 Pro. & D. 230; *Trafford v. Blanc*, L. R. 36 Ch. Div. 600.

In *Caujolle v. Ferrie*, 13 Wall. 465, a bill in equity was filed in the circuit court of the United States for the district of New York, by persons alleging themselves to be the next of kin of a person deceased, and asking for distribution of the estate. The defendant was the administrator of the estate, appointed by the surrogate of the county of New York, on the ground that he was the legitimate son and sole next of kin of the intestate. This issue had been tried by the surrogate, and the plaintiffs were ¹⁵⁴ parties to the proceeding. It was held by the supreme court of the United States that the adjudication in the surrogate's court was a bar to the bill in equity.

In the case at bar the groundwork of the admission of the will to probate was the adjudication that the testatrix was of sound and disposing mind and memory at the time of the signing of the will, so far as making a will was concerned. As this was within the time when the plaintiff contended that the mental and physical faculties of Mrs. Wilmarth had materially deteriorated, and as the plaintiff was a party to the proceedings in the probate court, we are of opinion that the ruling, which was carefully guarded, was right.

Exceptions overruled.

JUDGMENTS—RES JUDICATA—TO WHAT MATTERS ESTOPPEL EXTENDS.—The doctrine of *res judicata* is limited to matters involved in the litigation, but is equally applicable whether the point decided is of itself the ultimate, vital point, or only incidental, if still necessary to the decision of that point: *Wright v. Grifey*, 147 Ill. 496; 37 Am. St. Rep. 228, and note; *Huntley v. Holt*, 59 Conn. 102; 21 Am. St. Rep. 71, and note. A judgment is conclusive between the parties, not only as to such matters as were in fact determined in that proceeding, but as to every other matter within the issues which the parties might have litigated as incidental to, or essentially connected with, the subject matter of the litigation, whether the same, as a matter of fact, was or was not considered: *Denver Irr. etc. Co. v. Middaugh*, 12 Col. 434; 13 Am. St. Rep. 234, and note; *Hobby v. Bunch*, 83 Ga. 1; 20 Am. St. Rep. 301, and note; *Lorillard v. Clyde*, 122 N. Y. 41; 19 Am. St. Rep. 470, and note; *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436, and note. As to whether a judgment is conclusive as to facts which are not, though apparently, found by the court, see the extended note to *Lee v. Lea*, 96 Am. Dec. 775.

EVANS v. WALL.

[159 MASSACHUSETTS, 164.]

PARTIES, TRUSTEE AND BENEFICIARY.—If a trustee is authorized to pay over any part of the principal of a trust fund to a designated person, whenever he shall regard such payment as wise and expedient, and demanded by the needs of the beneficiary, and other persons are entitled upon the death of the beneficiary to receive whatever of the principal remains unexpended, the latter are not necessary parties to a suit involving such fund, but are sufficiently represented by the trustee.

A CREDITOR'S BILL TO REACH THE INCOME OF A TRUST FUND may be sustained by an execution creditor or an assignee in insolvency of the beneficiary, where a sum has been bequeathed to the trustee upon a trust to pay the income over to such beneficiary during the term of his natural life, although such trustee is also given authority, in addition to the income, to pay over any part of the principal when he shall regard such payment as wise and expedient, and demanded by the necessities of the beneficiaries.

SUIT by the assignee in insolvency of Sarah E. Balcom against her and her trustee to reach income payable to her under the will of James H. Wall, deceased. The fourteenth clause of such will gave George F. Wall five thousand dollars in trust, "for the following uses, purposes, and objects, and none other whatsoever, to wit: The income thereof, as it shall become due and payable, and be received by him, to pay over to my daughter, Sarah Elizabeth Balcom, formerly the wife of Sumner W. Balcom, for and during her life. In addition to said income, said trustee, or his successor, is hereby authorized to pay over any part of the principal sum at any time to the said Sarah Elizabeth Balcom, when he shall regard such payment wise and expedient, and demanded by the needs and necessities of the beneficiary." A demurrer to the bill was overruled, and a decree entered directing the trustee to account for the income of the fund. Defendants appealed.

H. E. Hill and W. G. Thompson, for the defendants.

J. Prentiss, for the plaintiff.

¹⁶⁸ ALLEN, J. The defendants at the argument in this court contend that those who at the decease of Mrs. Balcom will be entitled to the principal of the trust fund, or to such part thereof as shall then remain unexpended or unpaid, ought to have been made parties to the bill. This objection was not taken by demurrer, plea, answer, or otherwise in the superior court, but is presented for the first time, and, so far as appears, without previous notice to the plaintiff, in the argument here.

Under such circumstances the objection is entitled to no consideration, unless it appears that a decree for the plaintiff cannot be rendered without joining new parties: *Jewett v. Tucker*, 139 Mass. 566, 578. It is obvious, upon an examination of the provisions on which the rights of the possible remaindermen depend, that they have no interest which is entitled to be represented in court. The trustee is "authorized to pay over any part of the principal sum at any time to the said Sarah Elizabeth Balcom, when he shall regard such payment wise and expedient, and demanded by the needs and necessities of the beneficiary." If the trustee, by virtue of this authority, were proposing to make a payment to her from the principal, he would not be bound to consult them, nor would they have any right to be heard before him, or to ask the court to interpose and regulate or control such payment. The only interest which they have consists in the power or privilege of receiving so much of the principal of the trust fund as at her decease may remain unexpended or unpaid: *Williams v. Bradley*, 3 Allen, 270, 281. Such possible interest is sufficiently represented by the trustee, who has every motive ¹⁶⁹ to defend the trust fund: *Jewett v. Tucker*, 139 Mass. 566; *Sears v. Hardy*, 120 Mass. 524; *Dandridge v. Washington*, 2 Pet. 377; Story's Equity Pleading, sec. 140.

Upon the main question discussed, whether the plaintiff is entitled as assignee in insolvency to the income payable under item 14 of the will to Mrs. Balcom, it is obvious that he is so entitled if a creditor of Mrs. Balcom could maintain a bill to reach and apply such income: *Billings v. Marsh*, 153 Mass. 311; 25 Am. St. Rep. 635. The general rule is that income may be reached by a creditor, unless there is something in the language of the instrument creating the trust clearly showing an intention to the contrary: *Sears v. Choate*, 146 Mass. 395, 398; 4 Am. St. Rep. 320; *Maynard v. Cleaves*, 149 Mass. 307, 308. In applying this rule, it has been held that when one is entitled to the whole income, his creditors may reach it, even though it is mentioned that it is given for his support; but when one is entitled merely to be supported out of a trust fund, the value of his support cannot be reached: *Slattery v. Wason*, 151 Mass. 266; 21 Am. St. Rep. 448; *Maynard v. Cleaves*, 149 Mass. 307; *Baker v. Brown*, 146 Mass. 369.

Looking now at the language of the bequest in question. Item 14, clause 2, the provision is as follows: "The incor

thereof, as it shall become due and payable and be received by him to pay over to my daughter, Sarah Elizabeth Balcom, formerly the wife of Sumner W. Balcom, for and during her life." There are no words here authorizing the trustee in his discretion to withhold any portion of the income. The next clause is the one already quoted, giving to him a certain discretion in regard to the payment of the principal to her. This shows an intention on the part of the testator that she should have the whole income at all events, with an authority in the trustee as to further payments from the principal. There is a plain distinction between the words used in relation to the income, and those used in relation to the principal.

The will was obviously drawn with great care, and the testator in a later item expressly declares that its provisions have been carefully weighed and considered. The change in the terms of the provisions in reference to income and to principle must, therefore, be deemed to have significance.

A reference to other parts of the will also shows that when the ¹⁷⁰ testator wished to confer a discretionary power upon trustees he carefully expressed such intention. In item 15, in bequeathing to the same trustee the same sum of five thousand dollars in trust for the benefit of another daughter, he says: "The income thereof, as it shall become due and payable and be received by him, to pay over to my daughter, Emma Isabella Connell, if, in the exercise of a wise discretion, it shall seem to him proper so to do." And in order to make it more clear, he adds, with unnecessary repetition in respect to this second fund, "It being my object to put the disposition of this trust fund, principal and interest, in the hands of said trustee, to be used for the benefit of my said daughter Emma Isabella Connell, at his discretion." He thus made a clear distinction between this fund and the former one.

In item 18, the testator devised the residue of his estate in trust for the benefit of his four children, the income of one-fourth part to be paid to the trustee for each of his two daughters. In respect to the income received by the trustee from this larger trust fund for the benefit of Mrs. Balcom, the provision is as follows in item 20, clause 2: "The income arising from the fourth part of said rents, profits, issues, and income so paid to him, as it shall become due and payable, and be received by him, to pay over to my daughter, Sarah Elizabeth Balcom, for and during her life, at his discretion." The insertion of the words, "at his discretion," in this clause, and

the omission of them in the former clause relating to her income from the other fund furnish strong evidence that the testator's intention was different in respect to them. In item 21, clause 2, a similar discretion is given to the trustee in reference to the payment of the income received by him from the larger trust fund for the benefit of the other daughter, Mrs. Connell.

Some confirmation of the view that when the testator wished to vest in a trustee a discretion as to the payment of income he knew how to express that intention clearly, and that in some instances he wished to give such discretion, and in others not, may be found in item 9, respecting the payment of income to his brother; and in item 16, respecting the payment of income to two children of Mrs. Connell; and in item 17, respecting the payment of income to his widow.

¹⁷¹ The words in the will which are chiefly relied on by the defendants, as showing an intention to exempt the income going to Mrs. Balcom from liability for her debts, are the following: The bequest of the trust fund of five thousand dollars is said to be "for the following uses, purposes, and objects, and none other whatsoever." Then follow the clauses providing for the trustee's duties, and for the payment of income and principal, the latter of which have been already quoted. These words, in our opinion, do not qualify or explain the provision that the income is to be payable to Mrs. Balcom. When paid to her, she may use it as she pleases. The other words are those authorizing the trustee to pay over any part of the principal sum "at any time to the said Sarah Elizabeth Balcom, when he shall regard such payment wise and expedient, and demanded by the needs and necessities of the beneficiary." It is urged that a discretionary power is thus given to destroy the principal of the trust fund by paying it over to her, and that this involves a discretion also on his part in relation to the income.

Even if it be true that under this provision the trustee may pursue such a course that there will no longer be any income from the trust fund, because the trust fund itself will have ceased to exist, and that the plaintiff may in this manner lose all claim—a question which we do not enter upon, as it is not before us for determination—it certainly is the duty of the trustee to pay over the income as long as there is any. There is nothing in the language of the provision which at all looks to any curtailment of his duty in that respect. What-

ever income has been received in the past, or may be received in the future, is, by the terms of the will, payable absolutely to Mrs. Balcom, and being thus payable absolutely, it is subject to be reached by creditors, and by the plaintiff as assignee in insolvency.

Decree affirmed.

TRUSTS.—RIGHT OF CESTUI QUE TRUST TO DISTRIBUTION OF BALANCE OF EXHAUSTED TRUST: See *McCurdy's Appeal*, 124 Pa. St. 99; 10 Am. St. Rep. 575; *Van Doren v. Olden*, 19 N. J. Eq. 176; 97 Am. Dec. 650, and note, and *Sears v. Choate*, 146 Mass. 395; 4 Am. St. Rep. 320, and note.

CREDITOR'S BILL LIES TO REACH A DEBTOR'S INTEREST IN A TRUST FUND after the return of an execution unsatisfied at law: *Bramhall v. Ferris*, 14 N. Y. 41; 67 Am. Dec. 113; *Heath v. Bishop*, 4 Rich. Eq. 46; 55 Am. Dec. 654. The surplus only of a trust fund for the support of a debtor, after providing for support, can be reached by his creditors, under the New York law: *Graff v. Bonnett*, 31 N. Y. 9; 88 Am. Dec. 236.

DALTON v. WEST END STREET RAILWAY.

[159 MASSACHUSETTS, 221.]

▲ **JUDGMENT ENTERED UPON AN AGREEMENT OF COUNSEL AGAINST THE PROHIBITION OF HIS CLIENT** will be vacated upon application seasonably made, though payment of such judgment has also been made to such counsel, if the parties can be placed *in statu quo*.

PETITION for the vacation of a judgment entered for seven hundred and fifty dollars by agreement of plaintiff's counsel in an action to recover for personal injuries. The plaintiff had refused to consent to the settlement of the case for the sum named, and had so informed his counsel. Upon entry of the judgment the amount thereof was paid to counsel, and the judgment satisfied. The court ordered the judgment to be vacated on plaintiff's paying the defendant the seven hundred and fifty dollars received by the counsel, and the defendant appealed.

W. B. Sprout, for the respondent.

D. F. Kimball, for the petitioner.

222 **FIELD, C. J.** The only questions which have been argued relate to the authority of an attorney at law to make a compromise of a suit, to enter into an agreement for judgment, to file it in the cause, and to receive satisfaction of the judgment.

The exceptions recite, in effect, that the attorney for the petitioner ²²³ was not authorized to make the settlement which was made, but was told by his client not to make it. In *New York etc. R. R. Co. v. Martin*, 158 Mass. 313, we declined to enforce the specific performance of an agreement of compromise of a suit made by the attorneys, because it appeared that the attorney of the plaintiff in making the agreement had acted under a mistake of fact as to his authority. The reasons are stronger against enforcing such an agreement when in making it one of the attorneys has violated his instructions. In that case we declined to express an opinion whether, in this commonwealth, an attorney at law, by virtue of his employment, has authority to agree to a compromise of his client's suit out of court, but we said that the weight of authority in this country was that he had not any such authority. The court also said: "If such compromise is entered of record in the suit and relates to the disposition to be made of the suit, . . . it may be that it binds the parties to that suit, unless the court for good cause shown consents to the withdrawal of the agreement, and that, if it has been made without authority, or improperly made, the attorney is answerable in damages to his client." In the present case the agreement was made a matter of record in the suit, and judgment was entered accordingly, and the judgment was satisfied. But even when such agreements are entered of record in the suit, courts have the power to grant relief against them if made without the authority of the clients. They may refuse to enforce them or treat them as void: See *North Whitehall v. Keller*, 100 Pa. St. 105; 45 Am. Rep. 361; *Whipple v. Whitman*, 13 R. I. 512; 43 Am. Rep. 42; *Granger v. Batchelder*, 54 Vt. 248; 41 Am. Rep. 846; *Holt v. Jesse*, L. R. 3 Ch. Div. 177; *Swinfen v. Swinfen*, 2 De Gex & J. 381; *Holker v. Parker*, 7 Cranch, 436. In practice the assumed authority of attorneys of record to agree upon the amount of judgment to be entered, or to any other disposition of the suit, must be recognized by the court, and when entered of record such agreements are binding upon the parties, unless the court for good cause shown permits them to be withdrawn, or vacates any order founded upon them. But when the court is informed that they have been made against the express prohibition of the client, and the parties can be put *in statu quo*, we are of opinion that the court has the power to vacate any judgment founded upon them, and to order such ²²⁴ an agreement off

the files, if the application is seasonably made. It is not contended in the present case that the application to vacate the judgment was not seasonably made, or that the court had not the power at that time to vacate the judgment. We see no error in the exceptions.

Exceptions overruled.

JUDGMENTS ENTERED ON UNAUTHORIZED APPEARANCE OF ATTORNEY—VACATING.—The appearance of an attorney, if unauthorized, is ground for vacating the judgment: *Winters v. Means*, 25 Neb. 241; 13 Am. St. Rep. 489, and note; *Great West Min. Co. v. Woodmas etc. Min. Co.*, 12 Col. 46; 13 Am. St. Rep. 204; *Kirschbaum v. Scott*, 35 Neb. 199; *Corbitt v. Timmerman*, 95 Mich. 581; 35 Am. St. Rep. 586. See the extended notes to *Williams v. Johnson*, 34 Am. St. Rep. 519, and *Bunton v. Lyford*, 75 Am. Dec. 146; also the notes to *Bimeler v. Dawson*, 39 Am. Dec. 435, and *Harshey v. Blackmar*, 89 Am. Dec. 534.

McGUINNESS v. BUTLER.

[150 MASSACHUSETTS, 232.]

IF AN INFANT TRESPASSES ON THE PREMISES OF ANOTHER, AND IS THERE INJURED by something which he does while so trespassing, he cannot recover of the owner of the premises, unless the injury was wantonly inflicted or was due to his recklessly careless conduct.

INFANT'S RIGHT TO RECOVER FOR DAMAGES OCCASIONED BY HIS OWN WRONGFUL ACT does not exist, though he was acting when injured as children of his age, intelligence, and experience may be expected to act under like circumstances.

INFANT, INJURED BY HIS OWN WRONGFUL ACT.—**IF A CHILD PLAYING ON THE STREET INTERFERES** with marble slabs leaning against a house, whereby they are thrown over upon him and he is injured, he cannot recover of the owner of the premises, though the latter may have been negligent in leaving the slabs in the position in which he did, and the child in playing and doing with them as he did only acted as a child of his age might reasonably be expected to act.

ACTION of tort to recover for injuries suffered by plaintiff, a boy nearly nine years of age, from certain marble slabs falling over and upon him. These slabs were left leaning against the defendant's shop, the bottom of them projecting three or four inches into the street, and the top of them, where they rested against the defendant's house, being several inches inside the line of his premises. Plaintiff and another boy were playing in the street, and either he or the other boy took hold of one of the slabs at the top and pulled it over from the house against which it rested and caused it to fall, whereby plaintiff was injured. Though it was conceded that the boys were playing together and that it was part of the game to

take hold of these slabs, there was a conflict of testimony as to whether plaintiff did any thing towards the act by which the slabs were thrown over. The plaintiff proposed the following instruction to the jury, which was refused: "The fact that the plaintiff himself may have interfered with the slabs, and did thereby partially or wholly bring the injury upon himself, does not help the defendant, if the plaintiff's act was what the defendant's conduct naturally attracted and invited, and such interference and the boy's conduct was what might reasonably be expected of a boy of his tender years." The court in place thereof instructed the jury as follows: "It is claimed on the part of the defendant that you ought to find from the evidence, taking it reasonably, that the plaintiff was participating in what the other boy was doing, that he was so acting that he may be said fairly to be participating in the transaction. It is not enough for a person to stand by and witness a transaction to make the party responsible for the transaction. . . . Something more than bare observation is necessary to make participation. . . . If the boy was looking, whether between the slabs or not, that would not be a participation. If he had the curiosity to look in and see, that would not be participation. It would be participation if he asked him to take it off and let him look in. You can see the difference—the bare looking would not be participation while the asking to lift it away, or helping to do it, or, if he did not help, but asked it to be done, or did that which was an inducement or encouragement for the other to do it, then he may be said to have participated in it, although he may not have taken hold of it with his own hands. So that in order to find participation in the transaction, you will have to find that the party was doing something beyond standing and observing. . . . You are to say whether or not he was participating in this himself, or, in other words, was pulling over the stone upon himself, was giving encouragement to the doing of the act in such a way as, under the rules which I have given you, would make him a participator in it; and if he was participating in throwing over the stone upon himself, he cannot recover."

E. Greenhood, for the plaintiff.

F. Ranney, for the defendant.

236 MORTON, J. In order that a child may recover against one through whose negligence he claims to have been injured,

it is not always sufficient for him to show that he himself was in the exercise of such care as might reasonably have been expected of him. His conduct, notwithstanding that fact, may have been that of a wrongdoer, and may have contributed to the injury of which he complains. When it clearly appears that such was the case, he cannot avoid the effect of his conduct by showing that he was doing only what a child might have been expected to do. An infant cannot shift any more than an adult the consequences of his own wrongdoing or negligence upon another. Whether he was negligent or a wrongdoer very often is a difficult question to determine, and it is hard to say in all cases where the line should be drawn between negligence or wrongdoing and such care as, considering his age and experience, reasonably should be expected of him. But about the general principle there can, we think, be no question. Thus, if a child trespass on the premises of the defendant, and is injured by something that he does while trespassing, he cannot recover, unless the injury was wantonly ²³⁷ inflicted by, or was due to the recklessly careless conduct of the defendant: *Gay v. Essex Electric Street Ry. Co.*, 159 Mass. 238, 242, *post*, p. 415; *Daniels v. New York etc. R. R. Co.*, 154 Mass. 349; 26 Am. St. Rep. 253; *McEachern v. Boston etc. R. R. Co.*, 150 Mass. 515.

So if a child voluntarily participates in the wrongful acts of others, and is thereby injured, he cannot recover, though there may have been negligence on the part of the defendant which contributed to the injury: *Lane v. Atlantic Works*, 107 Mass. 104; 111 Mass. 136. Again, if a boy is injured while playing with a machine on which he has been set to work with proper instructions, he cannot recover, because such conduct constitutes contributory negligence on his part: *Rock v. Indian Orchard Mills*, 142 Mass. 522. See, also, *McAlpin v. Powell*, 70 N. Y. 126; 26 Am. Rep. 555. There is no suggestion in any of these cases that the plaintiff was entitled to recover if he was acting when he received the injury complained of as children of his age, intelligence, and experience naturally might be supposed to act under the same or similar circumstances. The principle for which the plaintiff contends would require us to hold that in no case would trespassing or intermeddling by a child, or participation by him in the act resulting in injury to him, be a bar, as matter of law, to his recovery, provided it appeared that the defendant was negligent, and that the child was only doing what he might

naturally have been expected to do. We do not think that such is the law.

We have assumed, for the purposes of this case, without deciding it, that the defendant was negligent in leaving the marble slabs where he did. The plaintiff concedes that there was also evidence tending to show that there was on the part of the plaintiff interference with them, growing out of the play in which he was engaged with the other boy. The court instructed the jury that, if the plaintiff participated in throwing the stone over upon himself, he could not recover. The jury must have found that the plaintiff did assist in doing the thing which caused the injury to himself. We think that the ruling was right.

Exceptions overruled.

INFANT TRESPASSERS.—LIABILITY FOR INJURY TO: See *Gunn v. Ohio River R. R. Co.*, 36 W. Va. 165; 32 Am. St. Rep. 842, and note with the cases collected, and the extended notes to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 596, and *Plummer v. Dill*, 32 Am. St. Rep. 470, 471.

GAY v. ESSEX ELECTRIC STREET RAILWAY.

[159 MASSACHUSETTS, 233.]

AN INFANT GOING WITH OTHER CHILDREN UPON STREET CARS LEFT in a public street by a street railway corporation, in violation of a municipal ordinance, must be regarded as a trespasser and joint actor with the other children, and therefore cannot recover compensation for injuries suffered by him either from any act done by himself or the other children, though the corporation knew that the cars would be attractive to children and was bound to anticipate what occurred.

A WRONGDOER AND TRESPASSER CANNOT RECOVER FOR INJURIES which are the joint consequence of his own wrong and the negligence of another, and this remains true, though the person injured is a child and only does what children of his age and intelligence may reasonably be expected to do.

ACTION of tort in which a demurrer was sustained to an amended declaration containing the following allegations: "The plaintiff says that the defendant is a street railway company, owning and managing a street railway between Peabody and Salem, in the county of Essex, and the defendant negligently, and without right, left several street railway cars standing unguarded in one of the public streets of said Salem a long time, to wit, for seven days; that said cars were furnished with dangerous brakes, with a brake handle on each

platform of the car, at the bottom of the brake-staff belonging to each of which were brake-chains, which were so connected together underneath the car that when either brake-chain was wound up the other one would violently unwind and recoil; and said brakes on said cars were left in a dangerous and unsafe position and condition, without any guard or any thing to prevent their recoiling with great force, without anybody to look out for them or watch them; the plaintiff further says that his intestate was a child of ten years, and while in the exercise of due care, and near said car or upon said car, where he had a right to be, he was injured through the negligence of the defendant and its agents and servants, and suffered greatly for a long time, to wit, for two months, and until his death; the plaintiff further says that his intestate was a traveler on said highway at the time of said injury, and rightfully upon said car; the plaintiff further says that he with other children was enticed and allured there by the opportunity for play afforded, and by the enticement and invitation of the defendant, its agents and servants; and further says that some of said children, or some of the agents and servants of the defendant, to the plaintiff unknown, were negligently using and misusing said brakes, and said children were doing said acts and were permitted and given permission, occasion, and opportunity to do said acts by the consent and with the knowledge, inducement, and invitation of the defendant, its agents and servants; that the defendant was using said street as a repair-shop, and said car was there without right, and contrary to the city ordinances of Salem; that it was the duty of the defendant to keep said car and said brakes securely locked and fastened, and in a safe and guarded position and condition, so that the children could not go upon said car, and could not use or play with said brakes, all of which negligence and acts of negligence heretofore alleged as existing prior to said injury the defendant well knew before said injury occurred, as well as that said car and brakes were an enticing, attractive, and inviting object to children, and that children then were, and long prior thereto had been, accustomed to play in, upon, and about said car, and with said brakes; and the plaintiff further says that all said acts and negligences which preceded or contributed to said injury the defendant should have anticipated would happen and should have prevented, and these were duties which it owed the plaintiff and his intestate."

C. G. Fall, for the plaintiff.

F. L. Evans, for the defendant.

²³⁹ MORTON, J. The plaintiff relies upon the amended declaration. It is difficult to understand from it precisely what the cause of action is, or precisely how the injury complained of was received by the plaintiff's intestate. It would seem, taking the declaration as a whole, that he was not a traveler on the highway (though there seems to be an allegation to that effect), nor a mere spectator injured while looking for a moment at what other children were doing, as was the case in both respects with the plaintiff in *Lane v. Atlantic Works*, 107 Mass. 104; 111 ²⁴⁰ Mass. 136. As we construe the declaration, it alleges in substance that the defendant left several cars standing in a public street for several days, in violation of a city ordinance, knowing that they would entice children, and that they did in fact entice children, to play upon them; that the brake-chains were so arranged that, when one brake was wound up, the other would violently unwind and recoil, and that the brakes were not fastened, and the cars were not guarded; that the plaintiff's intestate and other children were playing on the cars, and with the brakes, and that while doing so one of the brakes unwound and caused the injury complained of; that the leaving of the cars in the street unguarded, and with brakes unfastened, was an invitation by the defendant to the plaintiff's intestate and other children to play with them, or, if not, that the defendant should have known that the cars would entice children, and that it was its duty to keep the brakes fastened, and the cars guarded, so that children could not play upon them, and not to do so was negligence on its part, which rendered it liable for the injury to the plaintiff's intestate.

If the cars had been left standing by the defendant on its own premises, near the highway, in the same condition in which they were left standing in the street, it is clear under the decisions of this court that, however attractive they might have been to children, if the plaintiff's intestate had been injured by them while at play upon them he would have been a trespasser, and the defendant would not have been liable: *Lane v. Atlantic Works*, 107 Mass. 104; 111 Mass. 136; *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377; 30 Am. Rep. 686; *McEachern v. Boston etc. R. R. Co.*, 150 Mass. 515; *Daniels v. New York etc. R. R. Co.*, 154 Mass. 349; 26 Am. St. Rep. 253.

In such a case, the only duty which the defendant would have owed him would have been not to injure him wantonly, or by conduct recklessly careless on its part: *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377; 30 Am. Rep. 686; *McEachern v. Boston etc. R. R. Co.*, 150 Mass. 115, and *Daniels v. New York etc. R. R. Co.*, 154 Mass. 349; 26 Am. St. Rep. 253.

Assuming that there was evidence for the jury of the defendant's negligence in leaving the cars in the street as it did (see *Powell v. Deveney*, 3 Cush. 300; 50 Am. Dec. 738), we then come to the question whether the plaintiff's intestate is to be regarded as a trespasser ²⁴¹ and joint actor with the other children; if he is, then the question whether he was in the exercise of due care becomes immaterial. His wrongdoing as a trespasser and joint actor would in such event be a cause contributing to the injury, though in doing what he did he might be doing no more than would naturally be expected from a child of his age.

We think he must be regarded as a trespasser and joint actor with the other children. Leaving the cars in the street as it did was not an invitation or license by the defendant to him to play upon them, even though the defendant knew that they were calculated to attract children, and did in fact attract them. Knowledge on the defendant's part that they attracted children was not an invitation or license to them; otherwise, the fact that one knowingly maintained on his own premises an object that allured children would constitute an invitation to them. The most that can be said for the plaintiff is, that the defendant, knowing that the cars would be and were attractive to children, was bound to anticipate what actually occurred, and to exercise a corresponding degree of care to see that the cars were securely fastened and guarded, and is liable for an injury occurring to the plaintiff's intestate through its failure to do so. This assumes that all the plaintiff is required to show is that his intestate acted as reasonably as might be expected of him. But he might do that and still be a wrongdoer and trespasser, and contribute by his conduct to the injury which he received. If he did, then the fact of his youth, and the fact that the defendant's negligence also contributed to it, would not render the defendant liable. If the cars had been set in motion by other children, and the plaintiff's intestate had been injured by them while lawfully upon the highway, the defendant clearly would have been liable: *Lane v. Atlantic Works*, 111 Mass. 136. But he was

using the highway and the cars for play, and was a joint actor with other children in causing that to happen which resulted in his injury. We might fairly assume, if it were necessary, that a boy ten years of age, and of ordinary intelligence, would know that he had no right to play upon cars which a street railway company had left standing in the streets.

Upon the declaration, as we interpret it, we do not think that, under the decision of this state, the plaintiff is entitled ~~342~~ to recover: See cases *supra*; also *McAlpine v. Powell*, 70 N. Y. 126; 26 Am. Rep. 555.

It is possible a different result might be reached in the English courts, though the law does not seem to be finally settled there: *Lynch v. Nurdin*, 1 Q. B. 29; *Hughes v. Macfie*, 2 Hurl. & C. 744; *Mangan v. Alton*, L. R. 1 Ex. 239; *Clark v. Chambers*, 3 Q. B. D. 327; or in other courts in this country. *Railroad Co. v. Stout*, 17 Wall. 657; *Keffe v. Milwaukee etc. Ry. Co.* 21 Minn. 207, 209; 18 Am. Rep. 393; *Kansas Cent. Ry. Co. v. Fitzsimmons*, 22 Kan. 686; 31 Am. Rep. 203.

Judgment affirmed.

INFANT TRESPASSERS.—LIABILITY FOR INJURY TO: See *McGuinness v. Butler*, 159 Mass. 233, *ante* 412, and note.

TRESPASSERS—LIABILITY FOR INJURY TO.—A trespasser on the premises of another ordinarily assumes all risks of danger, and cannot recover for an injury received while there, without showing that it was wantonly inflicted, or that it might have been prevented by the exercise of reasonable care by the owner after his danger was discovered: *Frost v. Eastern R. R.*, 64 N. H. 220; 10 Am. St. Rep. 396, and note; *Lake Shore etc. Ry. Co. v. Bodemer*, 139 Ill. 596; 32 Am. St. Rep. 218. See further the extended note to *Central R. R. etc. Co. v. Vaughan*, 30 Am. St. Rep. 53, and the note to *Bedell v. Berkey*, 15 Am. St. Rep. 374.

CUSTY v. DONLAN.

[159 MASSACHUSETTS, 245.]

STATUTE OF LIMITATIONS—NEW PROMISE.—A receipt stating that the person signing it had, at various times, received of another person, designated therein, a sum of money also designated, "which is hereby acknowledged," is an unqualified acknowledgment of the debt as existing, and therefore constitutes a new promise sufficient to take the debt out of the statute of limitations.

STATUTE OF LIMITATIONS.—A NEW PROMISE is implied from a general unqualified acknowledgment of a debt.

ACTION to recover seven hundred dollars loaned to defendant Joseph H. Custy. The statute of limitations being pleaded,

the question was whether the acknowledgment was sufficient to take the case out of the statute of limitations.

L. T. Trull and F. N. Wier, for the plaintiff.

W. H. Anderson, for the defendant.

245 LATHROP, J. The only question in this case is as to the correctness of the ruling of the justice who tried the case in the superior court, that there was sufficient evidence to take the first three items of the account out of the statute of limitations: Pub. Stats., c. 197, sec. 1. In considering this question we shall lay aside the oral evidence of a promise to pay, which, under the Public Statutes, chapter 197, section 15, was not admissible: *Sumner v. Sumner*, 1 Met. 394, 396; *Chace v. Trafford*, 116 Mass. 529; 17 Am. Rep. 171. There remains the writing signed by the defendant, and delivered to the plaintiff on the day of its date, together with the **246** fact that no part of the money lent had been repaid. This writing, omitting the signature and date, is in these words: "Rec'd of Patrick J. Custy the sum of seven hundred dollars at various times to date, which is hereby acknowledged."

We are met at the outset of this inquiry by the question of the meaning of this writing. If it is to be construed as merely an acknowledgment that, at certain times in the past, the signer had borrowed money of the plaintiff, it would not be sufficient, for there must be an acknowledgment of a present indebtedness. We are of opinion that the words "which is hereby acknowledged" have a broader meaning. The word "which" refers to the word "sum." The acknowledgment is an acknowledgment as of the date when made. The language used is to be construed as if it were, "I have received of Patrick J. Custy the sum of seven hundred dollars at various times to date, which sum of money I now acknowledge." If, then, there is the unqualified acknowledgment of an existing debt, nothing more is needed, as the acknowledgment was made within six years before the bringing of the writ.

It is undoubtedly true, as said by Chief Justice Morton, in *Krebs v. Olmstead*, 137 Mass. 504, 505, that "it is not the acknowledgment which renews or revives the debt; the question is whether there has been a new promise within six years, of which the acknowledgment is evidence more or less controlling." But it is also true that an unqualified acknowledgment of a debt as an existing debt is conclusive. This is

conceded by all of the authorities in England, whence we derive our statute on this subject, and in this commonwealth, from the case of *Tanner v. Smart*, 6 Barn. & C. 603, to the present day. The difficulty has arisen in cases where the debtor went beyond an acknowledgment, and used language which rendered it doubtful whether a promise to pay could fairly be implied. Thus, in *Tanner v. Smart*, 6 Barn. & C. 603, Lord Tenterden, C. J., said: "Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may, and ought to be, implied."

The law on this subject is thus stated in *Philips v. Philips*, 3 Hare, 281, 299, by Vice-Chancellor Wigram: "The legal effect of an acknowledgment of a debt barred by the statute of limitations is that of a promise to pay the old debt, and for this ²⁴⁷ purpose the old debt is a consideration in law. In that sense, and for that purpose, the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it; for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by installments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him."

In *Mitchell's Claim*, L. R. 6 Ch. 822, 828, the rule is thus stated, to the same effect, but more concisely, by Lord Justice Mellish: "There must be one of these three things to take the case out of the statute. Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed." To the same effect are other English cases: *Chase-more v. Turner*, L. R. 10 Q. B. 500; *Quincey v. Sharpe*, 1 Ex. Div. 72; *Skeet v. Lindsay*, 2 Ex. Div. 314; *Green v. Humphreys*, L. R. 23 Ch. Div. 207; *Firth v. Slingsby*, 58 L. T., N. S., 481, 484.

These rules have been often recognized in this commonwealth. Thus, in *Barnard v. Bartholomew*, 22 Pick. 291, 293, it was said by Mr. Justice Dewey: "Applying the familiar rule, now well settled in this commonwealth, that in such cases there must be either an express promise to pay or an

unqualified acknowledgment of present indebtedness, and this unaccompanied by any evidence showing a determination not to pay, we think that the case of the plaintiff may be well sustained." In this case the debtor wrote: "I will thank you to let me have your account that you hold against me. Also I will thank you to state to me the credit that you have given me. You may depend on seeing me at your office on Monday next. I will endeavor to settle all my accounts with you; perhaps I shall not be able to pay the money; if not, we can find some way to settle." This was held to be a sufficient acknowledgment to take the case out of the statute.

²⁴⁸ In *Penniman v. Rotch*, 3 Met. 216, 218, it is said by Chief Justice Shaw: "The fact to be proved is a new promise to pay the debt. This may be inferred from an express and unqualified admission that the debt is due, but not from remote implication or doubtful or equivocal words": See, also, *Bailey v. Crane*, 21 Pick. 323; *Woodbridge v. Allen*, 12 Met. 470; *Roscoe v. Hale*, 7 Gray, 274.

In *Walsh v. Mayer*, 111 U. S. 31, in answer to a letter from the holder of a note secured by mortgage, calling attention to the want of insurance on the mortgaged property, and saying, "The amount you owe me on the seven thousand five hundred dollar note is too large to be left in such an unprotected condition, and I cannot consent to it," the mortgagors replied that they expected to insure in about four months twice that amount, and added: "We think you will run no risk in that time, as the property would be worth the amount due you if the building was to burn down." This was held to be an acknowledgment of an existing liability.

Judgment on the verdict.

LIMITATIONS OF ACTIONS—NEW PROMISE.—As to what acknowledgment or new promise will remove the bar of the statute, see the notes to *State v. Finn*, 14 Am. St. Rep. 660; *Spangler v. Spangler*, 9 Am. St. Rep. 116, and *Manchester v. Braedner*, 1 Am. St. Rep. 831. The words, "I propose to settle," written in answer to a demand for payment of a note barred by lapse of time, is a sufficient acknowledgment or new promise to take the case out of the operation of the statute: *Taylor v. Miller*, 113 N. C. 340. "I hereby renew the within note, with all interest," signed by the maker, is a sufficient indorsement upon a promissory note to effect a new promise: *Roane v. Ross*, 84 Tex. 46.

ALLEN v. CITY OF BOSTON.

[159 MASSACHUSETTS, 824.]

HIGHWAYS AND STREETS.—THE OWNER OF LAND OVER WHICH A HIGHWAY IS LAID RETAINS his right in the soil for all purposes consistent with the full enjoyment of the easement acquired by the public. This right may grow less as the public needs increase, but at all times he retains all that is not needed for the public use, subject, however, to municipal and police regulations.

HIGHWAYS AND STREETS.—THE OWNER OF LAND HAS THE RIGHT TO EXCAVATE UNDER A SIDEWALK, if he thereby does not violate any ordinance or regulation of the city.

NEGLIGENCE.—OWNER OF A LOT IS NOT NEGLIGENT IN NOT BUILDING A CELLAR-WALL so as to keep out sewage when he has no knowledge that the sewer will leak.

MUNICIPAL LIABILITY FOR SEWERS.—If the duty of keeping sewers repaired rests on a municipality, it is answerable to a property-owner who has constructed a cellar under a sidewalk for injuries received by the escape of odors and other noxious contents of the sewer into such cellar; nor can the city escape liability on the ground that the power to fix the location and prescribe the plan of sewers rests with the board of aldermen, if such board had not exercised that power.

A MUNICIPALITY IS NOT EXONERATED FROM LIABILITY for injuries suffered by a property-owner from its negligence respecting a sewer on the ground that his premises were not directly connected with the sewer, and he was not liable to be assessed for the expense thereof.

THE DAMAGES RECOVERABLE FROM A CITY FOR ITS NEGLIGENCE in respect to a sewer may include compensation for injuries to plaintiff's health and business, as well as injury to his property.

TORT for injuries to plaintiff's property, health, and business occasioned by a defective sewer. The trial judge instructed the jury as follows: "This action of tort rests upon the alleged negligence of the city of Boston. The plaintiff claims that from January, 1885, to June, 1890, the defendant city negligently failed properly to care for and maintain a certain main drain or common sewer, and negligently allowed it to become and remain defective, leaky, and not fit to be used; by means whereof large quantities of putrid and offensive matter came into the plaintiff's premises, and created offensive odors and stench, from which he suffered severely in his health and in his business. Certain facts are agreed in the case, or are not in dispute; viz., that Winter street is a public street; that the owner of the lot occupied by the plaintiff owns to the center of the street, and has all the rights to the center of the street which an abutting owner, whose deed carries him to the center of the way, would have, and that the plaintiff succeeds to those rights as lessee; that the sewer

in Winter street from which the trouble is alleged to have come is a public drain or common sewer maintained by the city. The authority to lay out main drains or common sewers in the city of Boston resides in the board of mayor and aldermen, who exercise the authority, not as representing the city, nor on its behalf, nor under its direction, but as public officers. The duties of the board of mayor and aldermen in laying out main drains and common sewers are of a *quasi* judicial nature, and involve the exercise of independent discretion, depending upon considerations affecting the public health and general convenience. It follows that the act of laying out a sewer is not the act of the city. It is the act of an independent board, and if there is a defect or want of sufficiency in the plan or system of drainage adopted no action lies to recover for damages on account of it. . . . The actual construction of a common sewer is the exercise of a merely ministerial duty, and, if not performed with reasonable care and skill, any person whose rights of property are injured by such negligence may have an action against the city. The actual construction is performed by the city itself. Also, after a common sewer is built, and until some change in its location or construction is directed by the board of mayor and aldermen, its care and maintenance devolve wholly upon the city, who provide for keeping it in order through such agents and officers as they choose to select and appoint. The sewer is the property of the city, and it is the city's duty to keep it in proper condition. This duty is ministerial, and the city is liable for negligence in its exercise to any person whom its negligence has injured. Before I speak of the main bearings of these two principles which I have stated, I will allude to one matter discussed in the argument. It was claimed on the one side, and denied on the other, that the city had a right to take up this sewer (the old 1825 sewer), and transfer its office and function to the other sewer built upon the other side of the street, . . . and I give you this ruling upon this question. The system of sewerage adopted for Winter street does not fix the location of the sewer; therefore if, to prevent sewage or sewer gases from escaping into the basement of the plaintiff's store, the location of the sewer should have been changed to the center of the street, it was the duty of the city to do it, and it is liable for not having done it. The form, character, and construction of a sewer are matters for which the city is responsible. . . . The continued

maintenance of the sewer in a proper form, of a proper character, and in a proper condition, is a matter for which the city is responsible. A person injured, therefore, by the negligence of the city, whether it be negligence of construction, or negligence of maintenance, may recover without reference to the question whether the city has a right to take away the sewer altogether, or to transfer it under the principle which I have spoken of. To come then to the bearing of these propositions upon the case itself. The plaintiff's case rests upon a claim of negligence. He says that for five years the city suffered polluting matter to escape from a sewer either improperly constructed in the beginning, or allowed to be in an improper condition, or both; that the escape of the polluting matter and the condition of the sewer were with notice to the city, and that he was greatly injured by the escape of this matter caused by the condition of the sewer. . . . Negligence is a breach of a duty. The city of Boston, having the duty of constructing and maintaining this sewer, owed to the plaintiff . . . the duty of properly and skillfully constructing this sewer, and maintaining it. . . . Did the city perform this duty? The board of mayor and aldermen, having the right to direct a sewer to be built, that is, to lay out a sewer, directed a sewer to be built through Winter street, and that direction included in itself necessarily the duty on the part of the city of Boston, who were to build it, of properly and skillfully constructing it, and properly and skillfully maintaining it after it was constructed. Did the city execute the work in a skillful and proper manner? and has the city since maintained a drain, the construction of which was proper and skillful? If so, the city is not responsible to the plaintiff. If it has failed in these particulars, or either of them, it is responsible to the plaintiff. There is a liability where the property of private persons is affected as the result of the negligent execution of the plan for the construction of a sewer, or the negligent failure to keep the same in repair afterwards, and free from obstruction. In such a case the city has the power to remove the cause of the trouble by substituting a skillful construction for unskillful construction, and by substituting proper maintenance for improper maintenance. Was the condition and construction of this sewer, in the beginning and subsequently, what it ought to have been? That is, was it what was proper? Was it what was skillful and reasonable to expect from the city? It is the duty of the

city to use due and reasonable care under all circumstances to prevent sewage leaking from the public sewers into a person's premises. The city is not to guarantee that it will not come in; the city is not to insure that it will not come in, but it is the city's duty to use due and reasonable care under all circumstances to prevent its coming in when they undertake to construct a public sewer. If the city has performed its duty in this respect, it is exempt from liability. If it has not, it is liable, and the verdict must be for the plaintiff. The question whether the sewer when originally constructed was proper under all the circumstances then existing is not material, provided the city did not exercise due care in continuing to maintain it in a leaky condition subsequently. That is, if its neglect consisted in the maintenance of an improper sewer, if it was guilty of neglect at all, it is not material whether the sewer was proper in the beginning under the circumstances then existing. The fact that the officers of the sewer department acted in the matter of the removal of this trouble is not evidence tending to show that the city is liable in the nature of an admission or otherwise. . . . I ought to refer to the subject of the conduct of the plaintiff himself. . . . A plaintiff cannot invite an injury, and then recover for it. I do not mean to indicate that there is evidence here which ought to indicate to your minds that that has been the case, but I am stating a general principle. A plaintiff in a position like the plaintiff here is bound to exercise that degree of care which would have been effective to guard him from the effects of a sewer properly constructed and maintained, and no more. He has a right to assume that the city will perform its duty, whatever that duty may be, and therefore he has a right to look for a sewer which is properly constructed and properly maintained, skillfully constructed and skillfully maintained. He is bound to exercise such care as would have been proper in the event of such a sewer being the sewer by which he was affected. If a sewer properly constructed and maintained overflows to the injury of a person, there is no recovery. If the city has done its duty, properly and skillfully constructed and maintained a sewer, the result is not the city's fault, and nobody can recover. If a sewer improperly constructed or maintained overflows or leaks, to the injury of a person, by reason of its improper condition, he may recover. It is not the plaintiff's duty to protect himself from sewage leaking in upon him

from a sewer if its construction or condition is improper. . . . In other words, a person's duty corresponds to the requirements of a sewer properly constructed and maintained. The plaintiff also was bound to use due care and proper efforts to render the injury to himself as light as it could be. He was bound to use all proper exertions to get rid of it as soon as he could, and upon the evidence the plaintiff claims that he has done so; it is for you to say whether he has. These are the principles upon which the case is to be determined. If you find for the defendant, you will simply so return your verdict. If you find for the plaintiff, you must give to him such a sum as damages as will, in your opinion, compensate him. Not to ask yourselves what would any one of us put himself in that man's place for beforehand, and go through it; that is no measure of damages. If the city is liable, you are to give him such damages as you in your judgment say will be a fair and proper compensation for the injuries which he has sustained in these respects: 1. For the loss he has sustained in his business, which may be measured by the difference in the value of the store free from the odor and the value as it was during the time the odor existed; 2. For the injury to his health, and his sufferings and the pain which he has experienced, and when compensation or damages are given for impaired health the condition of the person with reference to whether or not the trouble is over, whether or not it is likely to continue, and if so, for how long, what its character is, is to be taken into account, because this is the only suit which the plaintiff can ever have for the same cause; 3. The expenses he has been put to on account of the matter, as, for instance, medical attendance, and matters of that nature; 4. The injury to his business, if you find it to be so, from the persons in his employ being unable fully to perform their work, such an equivalent for their wages as you think he has suffered in that respect." Verdict for the plaintiff. The defendant alleged exceptions.

A. J. Bailey, for the defendant.

W. C. Loring and R. S. Gorham, for the plaintiff.

325 ALLEN, J. 1. The first objection now urged by the defendant is that the plaintiff's lessor acted in violation of law in building his cellar into the highway. This objection is untenable. There is no doubt that the general easement in the public acquired by the location of a highway extends

[Mass.]

ALLEN v. CITY OF BOSTON.

the limits of the highway as located: Commonwealth v. King, 13 Met. 115, 119. The right of the public includes various underground uses, of which the construction of sewers is one: Boston v. Richardson, 13 Allen, 146, 159, 160. But the owner of the land over which a highway is laid retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public: Tucker v. Tower, 9 Pick. 109; 19 Am. Dec. 350; Denniston v. Clark, 125 Mass. 216. This right of the owner may grow less and less as the public needs increase. But at all times he retains all that is not needed for public uses, subject however, to municipal or police regulations: 3 Kent's Commentaries, 433; Dillon on Municipal Corporations, 4th ed., secs. 656 b, 699, 700. The plaintiff's lessor, therefore, had a right to excavate under the sidewalk, if he thereby did not violate any ordinances or regulations of the city. It appears affirmatively that he did not. He interfered with no existing public use of the street. He was therefore using the land as he had a right to use it: McCarthy v. Syracuse, 46 N. Y. 194; Mairs v. Manhattan Real Estate Assn., 89 N. Y. 498.

2. The defendant further contends that the plaintiff's lessor was negligent in not building his cellar-wall so as to keep out sewage. There is nothing to show that he had any knowledge that there had been any leaking of sewage into the premises before, or that it was ever ascertained till 1880 that sewage from the old sewer percolated into the same. In the absence of knowledge that the sewer was improperly built, the plaintiff's lessor might well assume that it was tight, and due care on his part did not require him to guard against a defective construction of the sewer, the existence of which he had no reason to suspect. The defendant's request for instructions upon this subject was rightly refused; and there is no occasion to consider whether knowledge on his part that the sewer was out of order would show negligence, under the circumstances, and debar the plaintiff from recovering for the kind of damages complained of in this case.

3. The defendant asked the court to instruct the jury that they must find for the defendant if the only way in which the city could have prevented the injury was by removing the sewer either from the street or to some other part of the street. We are at a loss to see on the evidence how it could be found by the jury that there was no other way to prevent

the injury than those supposed. It would seem that a new and tight sewer might have been laid there, and all the evidence in the case so assumes. The defendant contends that the city was not at liberty to put in a new sewer, and to make it tight, because the entire jurisdiction to prescribe the manner of making it and the materials to be used in keeping it in repair was in the board of aldermen. But at no time has the board of aldermen gone so far as to prescribe in what part of the street the sewer should be laid or how it should be built. All these matters have been left to the superintendent of sewers, who was a city officer. The city, therefore, by its officer, might put the sewer in repair in any part of the street, and might prescribe the materials for building or repairing it. The duty of keeping a sewer in repair rested on the city: *Child v. Boston*, 4 Allen, 41, 51, 52; 81 Am. Dec. 680; *Emery v. Lowell*, 104 Mass. 13, 16; *Murphy v. Lowell*, 124 Mass. 564; *Bates v. Westborough*, 151 Mass. 174, 182-184. And if it was necessary to put the sewer in another part of the street, the city, through its superintendent of sewers, might have done it. Having the power to put the sewer where it would, the city ²²⁷ could not be excused for a negligent omission to make it safe, merely on the ground that the power to fix the location and to prescribe a plan of construction rested with the board of aldermen, when the board of aldermen had not exercised that power: *Child v. Boston*, 4 Allen, 41, 53, 54; 81 Am. Dec. 680; *Boston Belting Co. v. Boston*, 149 Mass. 44, 46, 47.

4. The fact that the plaintiff's premises were not directly connected with the old sewer does not prevent his recovering damages sustained by him through its negligent construction or maintenance. The liability of the city to the plaintiff does not depend upon the assessment of his estate for the cost of the sewer, but upon the injury done to him by the nuisance: *Stanchfield v. Newton*, 142 Mass. 110, 114; *Merrifield v. Worcester*, 110 Mass. 216, 221; 14 Am. Rep. 592; *Ball v. Nye*, 99 Mass. 582; 97 Am. Dec. 56; *McCarthy v. Syracuse*, 46 N. Y. 194.

5. The defendant also argues that the only damage the plaintiff can recover, if any, would be the injury to his property; and that injury to his health or business was wrongly allowed to be included in the damages. Such damages were specially alleged, and are clearly recoverable: *Hunt v. Lowell Gas Light Co.*, 8 Allen, 169; 85 Am. Dec. 697; *French v. Connecticut River Lumber Co.*, 145 Mass. 261.

In the opinion of a majority of the court the entry must be, exceptions overruled.

ABUTTING OWNERS ON STREET OR HIGHWAYS—RIGHTS OF.—An abutting owner of lands fronting on a public street is entitled to every right and advantage in that part of the street in which he owns the fee not required by the public. The easement of the public is the right to use and improve the street for the purposes of a highway only: *White v. Northwestern etc. R. R. Co.*, 113 N. C. 610; 37 Am. St. Rep. 639, and note.

MUNICIPAL CORPORATIONS—SEWERS—LIABILITY FOR DEFECTS IN AND WANT OF REPAIR OF.—This question will be found thoroughly discussed in *Chalkley v. City of Richmond*, 88 Va. 402; 29 Am. St. Rep. 730, and monographic note. See, also, the extended notes to *Perry v. Worcester*, 66 Am. Dec. 435; and *Ashley v. Port Huron*, 24 Am. Rep. 556.

PHELPS v. SIMONS.

[159 MASSACHUSETTS, 415.]

ESTATE BY ENTIRETIES.—A devise to a husband and wife vests in them an estate by entireties which the husband has the right to use during coverture, but cannot alienate.

ENTIRETIES—PERSONAL PROPERTY.—A BEQUEST TO A HUSBAND and wife vests in them an estate by the entireties.

ENTIRETIES IN PERSONAL PROPERTY, HUSBAND'S CONTROL OVER.—If personal property is bequeathed to a husband and wife and he undertakes to transfer it, his transfer vests in the transferee an estate for the life of the husband, but cannot deprive the wife of her right of survivorship should her life be prolonged beyond his.

ENTIRETIES.—A WIFE who is a tenant by the entireties with her husband of shares of stock in a corporation cannot be compelled to surrender the certificate of such stock to her husband's transferee.

J. Bliss, for the plaintiff.

J. E. McIntire, for Catharine L. Simons.

415 LATHROP, J. This is a bill in equity against Catharine L. Simons and Simeon B. Simons, her husband. Sarah C. Simons, the mother of Simeon, died on April 8, 1872. By her will, dated October 31, 1870, which has been duly admitted to probate, she devised and bequeathed the residue of her estate, real and personal, to her "son, Simeon B. Simons, and his wife, Kate L. Simons, and to the survivor of them, and the heirs of such survivor, to have and to hold the same forever."

Sarah died possessed, among other property, of twelve shares of the capital stock of the Second National Bank of Springfield. On December 3, 1872, said bank issued a certificate of

said shares, in which it is set forth that "Simeon B. Simons, and his wife Kate L. Simons, and the survivor of them, and the heirs of such survivor," are proprietors of twelve shares of the capital stock of said bank. The answer of the defendant Catharine, which is found to state the facts correctly, sets forth that she has possession of said certificate, "which was left in her possession several years since by her said husband."

On October 15, 1891, Simeon B. Simons, by an instrument in writing, undertook to sell said certificate, and the twelve shares of stock represented thereby to the plaintiff, for a valuable consideration. He also, by the instrument, appointed the plaintiff his attorney to make the transfer. The bank refused to make the transfer until the outstanding certificate was delivered up, and Catharine refused to deliver up the certificate. The prayer of the bill is that Catharine be ordered to produce the outstanding certificate, and to deliver the same to the plaintiff.

In 1870, when this will was made, and in 1872, when it was admitted to probate, the General Statutes were in force; and it was provided by chapter 108, section 1, that "the property, both real and personal, which any married woman now owns as her sole and separate property, that which comes to her by descent, devise, bequest, gift, or grant, . . . shall, notwithstanding her marriage, be and remain her sole and separate property." Mr. Justice Holmes, Mr. Justice Barker, and the writer of this opinion, think that under this statute Simeon B. Simons had no power to alienate his wife's interest, believing that the case of *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462, which relates to the validity of a lease made by a husband while the joint tenancy continued, has no bearing on the question. The same justices also think, that whatever may be the effect of the various statutes then in force as to the estate ⁴¹⁷ which the husband and wife took, the wife was entitled, as between herself and her husband, to one-half to her separate use: See *Mander v. Harris*, L. R. 27 Ch. Div. 166; *Jupp v. Buckwell*, L. R. 39 Ch. Div. 148. But the other justices are of opinion, on the authority of *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462, that the General Statutes, chapter 108, section 1, do not apply, and we proceed to consider the case irrespective of the statutes relating to married women.

At common law a devise to husband and wife vested in them an estate by entireties; not strictly a joint tenancy, but,

as said by Mr. Justice Wells in *Wales v. Coffin*, 13 Allen, 213, 215, "one indivisible estate in them both and the survivor of them": See, also, *Pierce v. Chace*, 108 Mass. 254; *Pray v. Stebbins*, 141 Mass. 219; 55 Am. Rep. 462; *Donahue v. Hubbard*, 154 Mass. 537; 26 Am. St. Rep. 271; *Morris v. McCarty*, 158 Mass. 11.

While the husband has the entire right to the use and benefit of the estate during coverture (*Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462), he cannot alienate it. Thus in *Fox v. Fletcher*, 8 Mass. 274, where land was devised to a husband and wife, the wife, who survived her husband, was held entitled to maintain a real action against a grantee in fee of her husband. So in *Donahue v. Hubbard*, 154 Mass. 537, 26 Am. St. Rep. 271, it was said by Mr. Justice Allen, "The peculiar feature of this kind of estate is that each is secure against an impairment of rights through the sole act of the other."

The bequest in this case is to the husband and his wife, "and the survivor of them, and the heirs of such survivor." A conveyance in this form, at common law, to persons not husband and wife would give a joint estate for life, and a contingent remainder to the survivor: 2 Cruise, Digest, tit. 18, c. 1, sec. 2, note; 1 Greenleaf's Cruise, 364 a; Coke on Littleton, 191 a; *In re Harrison*, 3 Anstr. 836; *Vick v. Edwards*, 3 P. Wms. 372; *Hannon v. Christopher*, 34 N. J. Eq. 459.

The plaintiff admits that, at common law, a bequest to husband and wife vests in them an estate by entireties: See *Gordon v. Whieldon*, 11 Beav. 170; *Atcheson v. Atcheson*, 11 Beav. 485. He contends, however, that, as at common law a husband may dispose of his wife's personal property as he pleases, he has the same right where the property is held by entireties. None of the cases which he cites for this position support it. There is no doubt that shares of stock may be bequeathed to a wife for life, with remainder to B. In such a case, at common law, the husband ⁴¹⁸ could dispose of only the life interest of his wife in the shares. And where the shares are left by will to a husband and wife, the latter takes a life interest with her husband, and a remainder contingent on her surviving him. With the latter, a court of equity will not permit him to meddle.

In *Atcheson v. Atcheson*, 11 Beav. 485, where a legacy was left to a husband and wife, it was held that the wife's right to it by survivorship was entitled to protection, and it was

ordered that the legacy be carried to the joint account of the husband and wife, with a direction to pay the dividends to the husband during their joint lives, with liberty, on the death of either, for the survivor to apply.

In *Moffatt v. Burnie*, 18 Beav. 211, a bequest was made to A and his wife, for their lives, with remainder over, and it was held that the husband and wife took, not in joint tenancy, but for their joint lives and the life of the survivor.

In *Ward v. Ward*, L. R. 14 Ch. Div. 506, where a husband and wife held an annuity by entireties, it was held that the whole of it was, during their joint lives, liable to the husband's debts, but the order was only to pay during the life of the husband: See, also, *Godfrey v. Bryan*, L. R. 14 Ch. Div. 516; *Craig v. Craig*, 3 Barb. Ch. 76, 105.

It follows, in the opinion of a majority of the court, that Mrs. Simons will be entitled to the shares of stock should she survive her husband. The mere fact that the husband placed the certificate in the possession of his wife gave her no additional rights: *Cummings v. Cummings*, 143 Mass. 340.

The result is that the plaintiff is entitled to the dividends on the stock during the joint lives of the husband and wife, and is entitled to the shares in the contingency of the husband surviving his wife. If, however, the wife survives her husband, she is entitled to the shares absolutely.

As the bank has not been made a party to this suit, no order can be passed directing it to do any thing. And, as the wife has an interest in the shares, there is no ground for directing her to deliver the certificate to the plaintiff, as the case now stands. If, before a final decree is entered, the plaintiff desires to amend his bill by making the bank a party, and to have a trustee appointed to hold the shares in accordance with this opinion, he may apply to a single justice for this purpose.

So ordered.

419 The chief justice, and Justices Knowlton and Morton, think that the statutes enabling married women to take, hold, manage, and dispose of real and personal property as if they were sole, do not apply to the estate or title by entireties of husband and wife in personal property any more than in real property: *Pray v. Stebbins*, 141 Mass. 219; 55 Am. Rep. 462. They also think that the will vested in the husband and wife a title by entireties in the shares in question. It follows that

the power over the shares is to be settled by the common law. By that law the husband became, upon marriage, the absolute owner of all the wife's chattels in possession: *Legg v. Legg*, 8 Mass. 99; *Commonwealth v. Manley*, 12 Pick. 173.

Upon reducing her choses in action to possession, he became the absolute owner of them also. If he did not reduce them to possession, and she survived him, she took them by virtue of her survivorship: *Hayward v. Hayward*, 20 Pick. 517.

If, therefore, these shares had belonged absolutely to the wife, the husband could have disposed of them at common law, as he has done, and thus would have extinguished completely the wife's right of survivorship. But these shares were not the wife's. The title to them was in the husband and wife by entireties. The whole of the title was in the husband as well as in the wife. Her right of survivorship cannot possibly be greater when the whole title is in her husband, as well as in herself, than when it is solely in herself. No case to which we have been referred holds that at common law the wife has a right of survivorship in a chose in action, either belonging solely to herself, or to her husband and herself by entireties, which is incapable of extinguishment by the husband in his lifetime. On the contrary, it was said in substance, in *Atcheson v. Atcheson*, 11 Beav. 485, which is relied on by the majority of the court, and which was a case of a legacy to a husband and wife, that her right to the whole as survivor was dependent on the fact that it had not been disposed of by the husband in his lifetime; and in *Ward v. Ward*, L. R. 14 Ch. Div. 506, it was distinctly held that the wife's right as tenant by the entirety of an annuity given to herself and husband during their joint lives was not property of the wife, out of which a settlement could be made under direction of the court for her benefit. The cases in regard to the husband's right over the wife's real estate, or over real estate belonging to himself and wife by entireties, ⁴²⁰ stand on a different ground, and furnish no guide in a case like this. No doubt, when an assignee in insolvency of the husband or his creditors comes into equity to compel a conveyance of the wife's choses in action, the court may require a provision for the wife to be made out of the property which they seek to reach, even to the extent perhaps of requiring the whole property to be applied to her benefit. Such was the case of *Davis v. Newton*, 6 Met. 537, 543. It may also be true that where a husband and wife are possessed of personal

property *per my et per tout*, a court of equity will, for good reasons, protect the wife's right of survivorship by preventing the husband before he has done so from disposing of the property during their joint lives. Such was the case of *Ward v. Ward*, L. R. 14 Ch. Div. 506. But neither the principle of *Davis v. Newton*, 6 Met. 537, nor that of *Ward v. Ward*, applies here. The wife's title by the entirety with her husband was not her separate property; and the husband has conveyed to the complainant, by an absolute conveyance for a valuable consideration, the whole title to the shares in question, as he has the right to do at common law, and has extinguished the wife's right of survivorship.

It is conceded that the mere fact that the certificate was placed in her possession by her husband gave her no additional rights.

We think that there should be a decree in favor of the complainant.

ENTIRETIES—CONVEYANCE BY EITHER HUSBAND OR WIFE ALONE.—Neither the husband nor wife can convey an estate vested in them as tenants in the entirety, unless the other joins in the instrument: *Naylor v. Minock*, 96 Mich. 182; 35 Am. St. Rep. 595, and note; *Boyetown Nat. Bank v. Hartman*, 147 Pa. St. 558; 30 Am. St. Rep. 759; *Bruce v. Nicholson*, 109 N. C. 202; 26 Am. St. Rep. 562, and note; *Enyeart v. Kepler*, 118 Ind. 84; 10 Am. St. Rep. 94, and note with the cases collected. See, also, the extended note to *Hulett v. Inlow*, 24 Am. Rep. 65.

TENANCY BY ENTIRETIES IN PERSONAL PROPERTY.—While there are many cases recognizing the existence of tenancy by the entireties, and that it has survived general statutes abolishing joint tenancy and regulating the separate property of married women, and in some instances rescuing such property from the control of their husbands, doubt still exists in the United States as to whether an estate by the entireties may exist in personal property, and still greater doubt, supposing it to exist, as to the right of the husband therein, and the means, if any, which may be taken to secure to the wife her ultimate right of survivorship should her life be prolonged beyond that of her husband. We have heretofore remarked that so able and careful a writer as Mr. Bishop has, with his usual force and strength of conviction, said that this tenancy is entirely inapplicable to personal property, and that "since the wife cannot own personal property in her possession in her own right, but whatever title she has to such property vests in the husband, if a chattel is given or sold to husband and wife jointly, the title passes wholly to him": Bishop on the Law of Married Women, sec. 211. His views upon this subject are unquestionably in accord with decisions in some parts of the United States: *Matter of Albrecht*, 136 N. Y. 91; 32 Am. St. Rep. 700; *Wait v. Bovee*, 35 Mich. 425. No decision of this purport exists in England so far as we are aware. We have referred to the decisions upon this subject in the note to *Den v. Hardenbergh*, 10 N. J. L. 42; 18 Am. Dec. 371; and in Freeman on Cotenancy and Partition, sec. 68; and notwithstanding the American cases as cited above we adhere to our view that tenancy by the en-

tireties may exist in personal as well as in real estate. The following comparatively recent decisions support our conviction: *Bramberry's Appeal*, 156 Pa. St. 628; 36 Am. St. Rep. 64; *Gillan v. Dixon*, 65 Pa. St. 395; *Godfrey v. Bryan*, 14 Ch. Div. 516; *Ward v. Ward*, 14 Ch. Div. 506; *Mander v. Harris*, 27 Ch. Div. 166; *Jupp v. Buckwell*, 39 Ch. Div. 148; *Phelps v. Simons*, 159 Mass. 415; *ante*, p. 430.

But conceding tenancy by the entireties to exist in personal property, doubt remains concerning the respective interests of the husband and wife, and as to the extent of his dominion over the property and the power of the courts to interpose to protect her interest therein. In one case in which crops had been raised upon land owned by the entireties it was held that they could not be sold under execution against the husband. An injunction was issued to prevent such sale: *Patton v. Rankin*, 68 Ind. 245; 34 Am. Rep. 254. But there is nothing in the opinion of the court from which we can determine whether its decree was the result of its conviction that chattels held by this tenancy are never subject to execution against the husband, or that they should be deemed, as between husband and wife and the creditors of the former, as part of the real property upon which they were produced and exempt from execution because such property was exempt. This latter reason, whether it influenced the court or not, cannot be regarded as sound, because while it is not possible, under an execution against the husband, to affect the wife's ultimate right of survivorship in real property, yet it is clear that in the absence of statutes to the contrary his life estate therein may be levied upon and sold, and the purchaser thereby invested with a right of possession subject to termination only upon the death of the husband in the lifetime of his wife: *Freeman on Cotenancy and Partition*, sec. 74. As to all chattels and chattel interests held by this tenancy, in the absence of statutes limiting the husband's control, he has the same right to recover possession and to use and control the property during the life of his wife as if such chattels were a part of her sole personal estate, including the right to receive any moneys due thereon in case they consist of annuities or choses in action, and the wife cannot, by resorting to a court of equity nor otherwise, obtain a decree of settlement in her favor whereby any portion thereof, or of the income therefrom, shall be set aside for her use or support: *Ward v. Ward*, 14 Ch. Div. 506; *Godfrey v. Bryan*, 14 Ch. Div. 516; *Atcheson v. Atcheson*, 11 Beav. 485. On the other hand it is probable that cases may arise in which the courts will protect from alienation or from other disposition by the husband of the property which will defeat her right of survivorship, and it is clear that the courts will not assist him in defeating such right, and that as to the personal property held by this tenancy which may remain after his death she is the sole owner thereof by right of survivorship: *Ward v. Ward*, 14 Ch. Div. 506; *Atcheson v. Atcheson*, 11 Beav. 485; *Phelps v. Simons*, 159 Mass. 415; *ante*, p. 430.

CHIPMAN v. PEABODY.

[150 MASSACHUSETTS, 420.]

CONFLICT OF LAWS.—AN ASSIGNMENT BY A COURT of insolvency of one state cannot of its own force convey to the assignee the title to land situate in another state, unless the laws of the latter state accord to the assignment that effect.

CONFLICT OF LAWS.—IF THERE ARE TWO INSOLVENCIES OR BANKRUPTCIES of the person in different states, the title of the assignee to the land of the debtor situate in each must be determined by the laws of the state where the land is situated. Therefore a mortgage or transfer of lands by an insolvent valid in the state in which they are situated cannot be avoided in the other state because forbidden by its laws.

SUIT by the assignee in insolvency of Dudley Hall and Dudley C. Hall to compel Francis H. Peabody to assign a mortgage of land in Maine to him, made to him by one of the insolvents.

J. Lowell, J. Lowell, Jr., for the defendants.

G. O. Shattuck and W. B. French, for the plaintiff.

431 **FIELD, C. J.** This case comes before us upon demurrer to the plaintiff's bill. It appears from the bill that Dudley Hall and Dudley C. Hall were partners, under the name of Dudley Hall and Company. We infer that both were inhabitants of this commonwealth. They filed a voluntary petition in insolvency in the court of insolvency for the county of Middlesex, in this commonwealth, and were duly adjudged insolvent debtors, and the plaintiff and one Haskins were appointed assignees of the joint and separate estates of said partners, and we infer that an assignment of their joint and separate estates was duly made to them pursuant to Public Statutes, chapter 157, sections 44, 46. Haskins has since died, and the plaintiff is now the sole assignee. On December 17, 1890, Dudley C. Hall, then being insolvent, conveyed by a deed of mortgage to Frank E. Peabody, one of the defendants, about twenty-eight thousand acres of timber land situated in the county of Aroostook, in the state of Maine. This mortgage was made to secure a pre-existing indebtedness of the firm of Dudley Hall and Company to the firm of Kidder, Peabody and Company, in which Frank E. Peabody was a partner with the other defendants, and Kidder, Peabody and Company had, when the mortgage was made, reasonable cause to believe that said Dudley C. Hall and said Dudley Hall and Company were insolvent, and that the conveyance was

made in fraud of ⁴²² the laws of Massachusetts relating to insolvency. On March 10, 1891, this land was attached on mesne process by the Manufacturers' National Bank of Boston, and by Stetson and Company of Bangor, Maine, on writs returnable to the supreme judicial court of Maine. On May 9, 1891, certain creditors of Dudley C. Hall filed a petition in insolvency against him in the court of insolvency for the county of Penobscot in Maine, and he was duly adjudged an insolvent debtor; the plaintiff and said Haskins were duly appointed by that court assignees of his estate, and we infer that an assignment of his estate was duly made to the assignees. The plaintiff is now the sole assignee of that estate. It is alleged that by the laws of Maine the attachments on this land were discharged by reason of this assignment. When these attachments were made, the statutes of Maine did not permit proceedings in insolvency against a nonresident debtor, and we infer that Dudley C. Hall was never an inhabitant of that state, but on March 27, 1891, the legislature of Maine amended the statutes relating to insolvency by an amendment which took effect on May 2, 1891, whereby nonresident debtors holding personal property or real estate within that state could be put into insolvency, and it was under this amendment that Dudley C. Hall was adjudged an insolvent debtor in that state. By the statutes of Maine, conveyances of property by the debtor in fraud of the insolvency laws of that state can be avoided by the assignee if made within four months of the filing of the petition by or against the debtor; by the statutes of Massachusetts, such conveyances can be so avoided if made within six months of the filing of such a petition. The mortgage to Frank E. Peabody was made within six months of the filing of the petition in Massachusetts, but more than four months before the filing of the petition in Maine.

The bill then alleges as follows: "The plaintiff, as assignee of the joint and separate estates of Dudley Hall and Dudley C. Hall under the deed of assignment from the judge of the court of insolvency for the county of Middlesex, in this commonwealth, has no standing in the courts of the state of Maine, and cannot maintain an action either at law or in equity to test the validity of the conveyance from said Dudley C. Hall to the defendant, Frank E. Peabody, nor can the plaintiff as assignee of the individual estate of Dudley C. Hall, under the deed of assignment ⁴²³ from the court of insol-

vency for the county of Penobscot and state of Maine, maintain an action at law or in equity against said defendant in the state of Maine, because the conveyance from said Dudley C. Hall to the defendant, Frank E. Peabody, was made more than four months before the proceedings in insolvency were instituted in said court of insolvency for the county of Penobscot against said Dudley C. Hall."

We cannot take judicial notice of the statutes of Maine, and do not here undertake to construe them. We merely state the effect of them as alleged in the bill. The assignment by the court of insolvency in Massachusetts would not of its own force convey to the assignees appointed by that court the title to the land of Dudley C. Hall situated in Maine, unless the laws of Maine gave it such an effect, and the bill must be taken to allege that this assignment did not convey to them the title to this land: *Eddy v. Winchester*, 60 N. H. 63; *Osborn v. Adams*, 18 Pick. 245; *Taylor v. Columbian Ins. Co.*, 14 Allen, 353.

The contention is that it is the object of our statutes relating to insolvency to vest in the assignee all the property of the debtor within and without the commonwealth, not specifically excepted, and that, although the assignment may not of its own force operate to convey real property situated without the commonwealth, yet the debtor can be compelled, under Public Statutes, chapter 157, section 74, to execute to the assignee conveyances of any part of his estate, real or personal, although it is situate without the commonwealth: See Pub. Stats., c. 157, secs. 46, 70, 75, 93, 96, 98; Stats. 1886, c. 322. We assume, without deciding it, that it is the intention of our statutes to reach the real property of the debtor without the commonwealth if it can be done, and that this may sometimes be done by means of a conveyance executed by him, and that the remedy provided by section 75 is not exclusive, but that a court of equity may compel such a conveyance. We understand, however, that by force of the insolvency proceedings in Maine, the title to this land, whatever it was, held by Dudley C. Hall at the time of filing the petition against him, vested in the assignees appointed there. It happens that the same persons were appointed assignees in Massachusetts and in Maine, but they might have been different persons. Dudley C. Hall is not a party to the present suit, and the plaintiff does not seek any conveyance from him. The plaintiff, as assignee in ⁴²⁴ Massachusetts, seeks

an assignment of the mortgage given to Frank E. Peabody, although not the assignment of the mortgage debt. If he should obtain it, he would then apparently hold the mortgage as assignee in Massachusetts, and the equity of redemption as assignee in Maine. If the effect of such an assignment would be to render the mortgage void, or if the mortgage should be declared void, the result, so far as appears, would be that, as assignee in Maine, he would hold the land free from the mortgage. If the assignees were different persons, could it be contended that, if the mortgage was assigned to the plaintiff as assignee in Massachusetts, he could keep the mortgage alive and foreclose it, unless the assignee in Maine should pay him the amount of the debt it was given to secure? By the statutes of Maine the mortgage is good as against the assignees appointed there.

Whatever may be the general rule in bankruptcy or insolvency proceedings as to foreign lands, we think that when there are two bankruptcies or two insolvencies of the same person in different jurisdictions, the title of the assignee to the land of the debtor situated in one jurisdiction must be determined by the law of the place where the land is situated. As by the law of Maine this mortgage is good against the plaintiff as assignee in Maine, we are of opinion that it cannot be avoided by him as assignee in Massachusetts. See *Chipman v. Manufacturers' Nat. Bank*, 156 Mass. 147; *Batcheller v. National Bank of the Republic*, 157 Mass. 33.

Bill dismissed.

CONFLICT OF LAWS—ASSIGNMENT FOR THE BENEFIT OF CREDITORS.—An assignment of property for the benefit of creditors, valid by the laws of another state, where made, will not be upheld by the courts of Minnesota when contrary to the policy and laws of that state as to the property situated there: *Matter of Dalpay*, 41 Minn. 532; 16 Am. St. Rep. 729, and note. Nonresidents are affected by insolvent laws only so far as they control the disposition of the property within the state: *Macdonald v. First Nat. Bank*, 47 Minn. 67; 28 Am. St. Rep. 328, and note. The validity of an assignment of lands for the benefit of creditors must be determined by the law of the state where the lands are situated: *Moore v. Church*, 70 Iowa, 208; 59 Am. Rep. 439, and note; *Stricker v. Tinkham*, 85 Ga. 176; 89 Am. Dec. 280; *Loving v. Pairo*, 10 Iowa, 282; 77 Am. Dec. 108; *Varnum v. Camp*, 13 N. J. L. 326; 25 Am. Dec. 476, and extended note; *Walters v. Whitlock*, 9 Fla. 86, 76 Am. Dec. 607, and note. See the notes to *Thurston v. Rosenfeld*, 97 Am. Dec. 355; *Martin v. Potter*, 71 Am. Dec. 690, and the extended note to *Hanford v. Paine*, 78 Am. Dec. 595.

NORMILLE v. GILL.

[159 MASSACHUSETTS, 427.]

PARTY WALLS.—THE OWNER OF LAND IN BUILDING A PARTY WALL partly on his own land and partly on that lying adjacent has no right, against the objection of the adjacent owner, to leave openings in the walls for windows, to be used for his own convenience until such time as his neighbor shall build upon the adjacent land.

A PARTY WALL OR PARTITION WALL MEANS A SOLID WALL.

SUIT to enjoin the defendant from using a wall put up by him on the line dividing his estate from plaintiffs, for any other purpose than that of resting timbers thereon, and to enjoin him from building windows therein.

S. L. Whipple, for the defendant.

J. R. Murphy, for the plaintiffs.

427 ALLEN, J. The principal question is whether the owner of land in building a party wall partly upon his own land and partly upon that lying adjacent has a right, against the objection of the adjacent owner, to leave openings in the wall for windows, to be used for his own convenience until such time as his neighbor shall build upon the adjacent land. We are of opinion that he has no such right. The ownership of the land under a party wall remains in the several owners, subject to the easement of supporting the building upon each lot by means of the common wall. This easement is limited to what is necessary for that purpose. The maintenance of windows by one owner against the objection of the other is inconsistent with the title and rights of the latter. By usage the words "party wall" and "partition wall" have come to mean a solid wall. Various reasons of inconvenience or peril have been assigned for the doctrine, **428** but they are all referable, we think, to the general doctrine that the easement is only a limited one, and it is not to be extended so as to include rights and privileges not belonging to the character of a wall which is to be owned in common, and in which the rights of each owner are equal. This question has not heretofore been determined in this state, though other questions relating to party walls have arisen: *Vinton v. Greene*, 158 Mass. 426; *Everett v. Edwards*, 149 Mass. 588; 14 Am. St. Rep. 462; *Matthews v. Dixey*, 149 Mass. 595; *Quinn v. Morse*, 130 Mass. 817; *Phillips v. Bordman*, 4 Allen, 147. The decisions in these cases are not directly applicable, but in other states the almost uniform current of decision has been against

the right to leave such openings in party walls: *Partridge v. Gilbert*, 15 N. Y. 601, 614; 69 Am. Dec. 632; *Brooks v. Curtis*, 50 N. Y. 639; 10 Am. Rep. 545; *St. John v. Sweeney*, 59 How. Pr. 175; *Traute v. White*, 46 N. J. Eq. 437; *Vollmer's Appeal*, 61 Pa. St. 118; *Milne's Appeal*, 81 Pa. St. 54; *Ingals v. Plamondon*, 75 Ill. 118; *Gibson v. Holden*, 115 Ill. 199; 56 Am. Rep. 146; *Bloch v. Isham*, 28 Ind. 37; 92 Am. Dec. 287; *Sullivan v. Graffort*, 35 Iowa, 531; *Graves v. Smith*, 87 Ala. 450; 13 Am. St. Rep. 60; *Dauenhauer v. Devine*, 51 Tex. 480; 32 Am. Rep. 627; 8 Kent's Commentaries, 437, and note.

Decree affirmed.

PARTY WALLS MUST ORDINARILY BE CONSTRUED TO MEAN A SOLID WALL: *Graves v. Smith*, 87 Ala. 450; 13 Am. St. Rep. 60, and note; but in *Hamman v. Jordan*, 129 N. Y. 61, it was held that the term "party wall" does not necessarily imply a solid structure.

PARTY WALLS—OPENINGS IN.—One part owner of a party wall may be enjoined at the suit of the other from making windows or other openings in the wall: *Graves v. Smith*, 87 Ala. 450; 13 Am. St. Rep. 60, and note; *Harber v. Evans*, 101 Mo. 661; 20 Am. St. Rep. 646. See the extended note to *Bloch v. Isham*, 92 Am. Dec. 297.

DOUGLAS v. STETSON.

[159 MASSACHUSETTS, 428.]

MORTGAGE, REISSUE OF.—If the note secured by a mortgage of chattels is fully satisfied, but subsequently the mortgagor procures a new loan of the mortgage and reissues the note and redelivers the mortgage to him with an oral agreement that all the written privileges and powers contained in the mortgage shall be revived for the purpose of securing this loan, this transaction does not vest in the mortgagee any title to the goods mortgaged, there being no delivery of such goods to him. Especially is this true where the second loan is for a different amount from the first, and the mortgage was executed both by the mortgagor and his wife, and the oral agreement was made by him alone.

TORT for the conversion of certain chattels. The defendant claimed to have a right to the possession thereof under a mortgage made March 8, 1889, by plaintiff and his wife to secure the payment of three hundred dollars within three months after date. On January 8, 1890, this amount was paid in full, and it was claimed that at that time plaintiff said to defendant, "I do not know how long before I shall need this money again," to which defendant replied, "Keep your papers and you can reborrow what you desire at

any time." This conversation was, however, denied by the plaintiff. The mortgage was not discharged of record, but the note and mortgage were returned to the plaintiff, who kept them until March 12, 1890, when he applied for and obtained a loan of defendant of one hundred and twenty dollars, and returned to defendant the old note and mortgage, and there was evidence tending to prove that plaintiff and defendant agreed that the mortgage should be revived for the purpose of securing the new note. Interest becoming in default on this second loan, defendant took possession of the property, against plaintiff's objection, and sold it at public auction.

C. E. Washburn, for the plaintiff.

R. R. Gilman and W. H. Mitchell, for the defendant.

420 MORTON, J. By the mortgage of March 8, 1889, the defendant acquired a defeasible title to the goods, subject to be defeated and revested in the mortgagors upon performance of the conditions of the mortgage: *Landon v. Emmons*, 97 Mass. 37; *Weeks v. Baker*, 152 Mass. 20, and cases cited. The payment by the mortgagors, without any thing more, of the sum secured by the mortgage, operated of itself to discharge the mortgage; and the mortgagors were thereupon in possession of the goods as of their former title: *Parks v. Hall*, 2 Pick. 206, 210, 211; *Clafin v. Godfrey*, 21 Pick 1; *Merrill v. Chase*, 3 Allen, 339; *Joslyn v. Wyman*, 5 Allen, 62; *Franklin Bank v. Pratt*, 31 Me. 501; *Mead v. York*, 6 N. Y. 449, 451; 57 Am. Dec. 467. The defendant relies upon a reissue to him by the plaintiff of the note for a new loan, accompanied by a redelivery of the mortgage with the agreement that all the rights, privileges, and powers 421 contained in the mortgage deed should be revived for the purpose of securing him for the loan thus made to the plaintiff. The question is whether this transaction vested the title to the goods in the defendant, it not being claimed that there ever was any delivery of them to him, or that he acquired any right to, or authority over, them, except by this transaction. We do not think it did. The reissue of the note for a valuable consideration certainly did not convey to the defendant a title, defeasible or otherwise, to the goods (*Merrill v. Chase*, 3 Allen, 339): did the redelivery of the mortgage deed, under the circumstances, and with the agreement set forth? It is said in *Rolle's Abr. Faits (N) 3*, page 26, that, "if a man seal and deliver a deed, and then the seal is torn off from such deed, if

he seals and delivers it again, though the same writing remains, that is still a good deed"; and, again, in Com. Dig. Faits (B), 5, that, "if a deed be canceled, and afterwards executed and delivered *de novo*, it shall be good." It is evident that the authors were speaking of the delivery of a deed as originally drawn for the purpose of carrying out the agreement as originally made. This is not such a case. It is an attempt to attach a new debt arising out of a new transaction to a mortgage which has been paid, and is no longer a subsisting security, but which it is claimed the parties have revived by agreeing that it should be security for a new debt: *Merrill v. Chase*, 3 Allen, 339, and *Joslyn v. Wyman*, 5 Allen, 62. The purpose of a written mortgage is to state in all essential particulars the contract between the parties to it. We think the original mortgage departs too widely from the transaction in which it was sought afterwards to use it to be made available as security for the loan then made. The parties are not the same. The original mortgage was made and executed by the plaintiff and his wife. The covenants contained in it were their covenants. The note secured by it was their note. The conditions related to the amount then borrowed, which was different from that borrowed by the plaintiff afterwards, and provided that the sum then borrowed should be paid within three months from the date of the mortgage, and that upon its payment the note signed by the plaintiff and his wife should be void. In order that the original mortgage deed should correspond with the transaction in which the defendant now seeks to avail himself of it as security, it would be ⁴³² necessary to rewrite it in many essential particulars. We must take the instrument as it is, and we do not think the defendant can avail himself of it as security for the debt to which he seeks to apply it: *Joslyn v. Wyman*, 5 Allen, 62; *Merrill v. Chase*, 3 Allen, 339; and *Mead v. York*, 6 N. Y. 449; 57 Am. Dec. 467.

The defendant has proceeded on the footing of a mortgagee, and by virtue of the right and power supposed to be vested in him as mortgagee. The instrument being inoperative as a mortgage, the sale, which was against the plaintiff's objection, and without his consent, was wrongful. The case might stand differently if the plaintiff were seeking the aid of the court as a court of equity to compel the defendant to cancel and discharge or redeliver the mortgage: *Upton v. National Bank*, 120 Mass. 153; *Joslyn v. Wyman*, 5 Allen, 62. This,

however, is an action at law. A majority of the court are of opinion that the entries should be, verdict set aside, judgment for the plaintiff for two hundred and fifty nine dollars and eighty-two cents, and interest from date of writ, and it is so ordered.

MORTGAGES—REVIVAL—DISCHARGE BY PAYMENT.—A mortgage is discharged by payment or release of the debt for which it is security: *Bunker v. Barron*, 79 Me. 62; 1 Am. St. Rep. 282, and note; *Bowman v. Manter*, 33 N. H. 530; 66 Am. Dec. 743, and note; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236; 19 Am. Dec. 71; *McMillan v. Richards*, 9 Cal. 365; 70 Am. Dec. 655, and note; *Ryan v. Dunlap*, 17 Ill. 40; 63 Am. Dec. 334, and note.

HOWLAND v. INHABITANTS OF MAYNARD.

[159 MASSACHUSETTS, 484.]

LIBEL.—A TOWN IS NOT ANSWERABLE FOR A LIBEL referred to in an account or contained in any report of a committee accepted by it. No action lies, because what is done by a town is done as a political body, and as a part of the administration of the government.

E. Avery and H. L. Baker, for the plaintiff.

J. Hillis, for the defendant.

485 **MORTON, J.** It is possible that this case might be disposed of on the ground that there was no publication by the town of the alleged libel, or that what was done was privileged. But as we are of opinion that the defendant is not liable on the main question, we have not considered the questions of publication and privilege.

Towns are instituted, in this state and in New England generally, for political purposes. They are created for convenience in the administration of the government: *Stone v. Charlestown*, 114 Mass. 214, 223; *Coolidge v. Brookline*, 114 Mass. 592, 596; *Agawam v. Hampden*, 130 Mass. 528, 531. They are given such powers as are necessary to carry into effect the purposes for which they are organized. Their powers are special and limited, because the purposes for which they are established are circumscribed. So far as the duties imposed upon them are purely public and common to all towns, such as the maintenance of police, health, schools, and highways, for instance, they are not liable for an injury caused to any one through neglect in their performance, except in cases where a remedy is expressly given by statute: *Hill v.*

Boston, 122 Mass. 344; 23 Am. Rep. 332; *Tindley v. Salem*, 137 Mass. 171; 50 Am. Rep. 289.

But there are many matters upon which they act that are of local concern, and which, though public in the sense that they are for the general benefit of all the inhabitants of the particular town, are special to the inhabitants of that town. Such are water works, gas or electric lighting, free baths, the maintenance of main drains and common sewers, and other similar things. Upon all these matters, those which are common to all towns, and those which may be called special and local, towns may act at meetings regularly called according to law. All things relating to them are, or properly may be, subject to the action and ⁴²⁶ consideration of the voters of the town duly assembled in town meeting. And whatever is done at such a meeting is done by the town in a legislative capacity and as a political body, and not in any sense by it as a private or *quasi* private corporation, whatever may be the subject that is acted upon. The town may, at such meetings, act through committees, as the legislature does, and may accept or reject, in whole or in part, or recommit, or modify in any manner, the reports of its committees.

When the reports are finally acted on by the town they become part of the doings of the meeting at which such action took place. The town may print and publish them in whole or in part, as the general court prints and publishes its proceedings. The town meeting is a political body, like the general court. No statute gives a right of action against a town to any individual who may be referred to in a vote of the town, or in any report of a committee accepted by it, in a manner which, if it were done by a private person, would be libelous. And no action lies, on general principles, because what is done by the town is done by it in such a case as a political body, and as a part of the administration of the government. To hold that an action of libel could be maintained against the defendant under the circumstances set out in this case would be to hold, in effect, that any party who felt himself aggrieved by any statement in the record of any city council in this state could maintain an action for libel against the city. We have been referred to no case in this country in which an action of libel has been maintained against a city or town. A case in Canada and one in England, to which our attention has been called, are not authoritative, because of the differences between English and American municipal-

ities: 1 Dillon on Municipal Corporations, 4th ed., secs. 28, 29. Moreover, it would seriously impair the freedom of investigation which is often required in the proper conduct of municipal affairs if cities and towns were held liable to be sued in actions of libel.

The view which we have taken of the case has rendered it unnecessary to consider whether a town can be guilty of malice, or to consider under what circumstances an action of tort will lie against a town, and under what circumstances not—questions which have been discussed at some length by the plaintiff in his brief.

Verdict to stand.

MUNICIPAL CORPORATIONS.—To determine whether there is a municipal responsibility, the inquiry must be whether the department whose misfeasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty, or charged with a duty, primarily resting upon the municipality: *Pettengill v. Yonkers*, 116 N. Y. 558; 15 Am. St. Rep. 442; *Hickox v. City of Cleveland*, 8 Ohio, 543; 32 Am. Dec. 730; extended notes to *Lloyd v. Mayor*, 55 Am. Dec. 349, and *Perry v. Worcester*, 66 Am. Dec. 434; and it is not liable for a tort in the absence of a statute making it liable: *Threadgill v. Board of Commissioners*, 99 N. C. 352.

SKINNER v. TIRRELL.

[159 MASSACHUSETTS, 474.]

SUBROGATION.—THERE MUST BE A NEW AGREEMENT, either express or implied, or some obligation, interest, or right, legal, or equitable, on the part of a party making a payment or advance in respect to the matter concerning which payment is made of the moneys advanced in order to entitle him to subrogation.

SUBROGATION.—A MERE VOLUNTEER is not entitled to subrogation.

SUBROGATION.—ONE WHO ADVANCES MONEY TO A WIFE LIVING SEPARATE FROM HER HUSBAND, and which she uses for necessaries, is not entitled to be subrogated as against him to the rights of a person by whom necessaries are furnished and to whom the wife made payment out of the moneys so advanced.

MONEY IS NOT NECESSARIES, AND A MARRIED WOMAN living separate from her husband cannot borrow money on his credit to purchase necessaries and thus create a liability against him.

J. D. Long and E. C. Bumpus, for the plaintiff.

H. Kingman, for the defendant.

474 MORTON, J. This is a bill in equity, in which the plaintiff, who has advanced money to the defendant's wife

while living apart from her husband, which she expended, it is alleged, in the purchase of necessities, seeks to be subrogated to the rights of the persons furnishing the necessities, and prays that the defendant may be ordered to pay to her the amount so advanced. The defendant demurred to the bill. The demurrer was sustained and the bill was dismissed, and the plaintiff appealed.

The demurrer was a general one, and it was claimed at the argument, as one ground of it, that the bill did not set out sufficient facts to show that the wife was living apart from her husband for justifiable cause. Without considering whether this objection was well taken, we assume that, if valid, it could be removed by amendment. The question then is whether the bill, if amended so as to remove this objection, can be maintained either on the ground of subrogation or on the ground of a general equity. We think it cannot stand on either.

There can be no subrogation unless there is something to be subrogated to. A debt or liability cannot be created where none existed for the purpose of effecting a substitution. There never was any liability on the part of the defendant to the parties who furnished the wife with the necessities. The goods were sold to her and were paid for by her. They were not furnished on the defendant's credit, but on the wife's. The money that was advanced by the plaintiff was not advanced to the parties who ⁴⁷⁵ furnished the necessities, but to the wife, to be expended by her as she saw fit. There is no ground, therefore, for the application of the doctrine of subrogation. Although the right of subrogation does not depend on contract, but rests on natural justice and equity, there must be either an agreement, express or implied, to subrogate, or some obligation, interest, or right, legal or equitable, on the part of the party making the payment or advance in respect of the matter concerning which payment is made or money advanced, in order to entitle him to subrogation: *Hart v. Western R. R. Co.*, 13 Met. 99; 46 Am. Dec. 719; *Amory v. Lowell*, 1 Allen, 504; *Wall v. Mason*, 102 Mass. 313; *Ætna Ins. Co. v. Middleport*, 124 U. S. 534; *Gans v. Thieme*, 93 N. Y. 225, 232; *Arnold v. Green*, 116 N. Y. 566; *Nolte v. Creditors*, 7 Martin, N. S., 602; *Johnson v. Barrett*, 117 Ind. 551; 10 Am. St. Rep. 83; *McNeil v. Miller*, 29 W. Va. 480; *Miller's Appeal*, 119 Pa. St. 620; *Suppiger v. Garrels*, 20 Ill. App. 625; *Gadsden ads. Brown*, Speer's Eq. 37, 41; *De Concilio*

v. *Brownrigg* (N. J. Ch. Nov. 25, 1892), 25 Atl. Rep. 383; *Brewer v. Nash*, 16 R. I. 458, 462; 27 Am. St. Rep. 749; *Blackburn Building Society v. Cunliffe*, L. R. 22 Ch. Div. 61; *Stevens v. King*, 84 Me. 291; Sheldon on Subrogation, secs. 2, 3, 240.

A mere volunteer is not entitled to subrogation: *Ætna Ins. Co. v. Middleport*, 124 U. S. 534; *Arnold v. Green*, 116 N. Y. 566; *Gadsden ad. Brown*, Speer's Eq. 37; Sheldon on Subrogation, secs. 241, 242, and cases cited. Nor is one who lends money to another to pay a debt entitled as a matter of right to stand in the creditor's shoes: Sheldon on Subrogation, secs. 241, 242, and cases cited. So far as subrogation is concerned, the plaintiff's contention resolves itself into the proposition that the defendant's wife could have bought on her husband's credit the necessaries which she purchased and paid for with the money advanced to her by the plaintiff; that if the plaintiff had paid the parties supplying the necessaries their several demands, she would have been entitled to be subrogated to their claims against the defendant; and that therefore a decree should be entered in her favor against the defendant in this suit. If the premises are correct, manifestly the conclusion does not follow from them.

There are ancient and modern cases in England which hold that a person advancing money to a married woman under circumstances like those in this case can recover the same of the ⁴⁷⁶ husband in equity: *Harris v. Lee*, 1 P. Wms. 482; *Marlow v. Pitfeild*, 1 P. Wms. 558; *Deare v. Soutten*, L. R. 9 Eq. 151; *Jenner v. Morris*, 3 De Gex, F. & J. 45. See, also, *In re Wood*, 1 De Gex, J. & S. 465.

These cases have been followed in this country in Connecticut (*Kenyon v. Farris*, 47 Conn. 510, 36 Am. Rep. 86), and there is a dictum in a case in Pennsylvania: *Walker v. Simpson*, 7 Watts & S. 83; 42 Am. Dec. 216. To the same effect certain text-writers, also following the English cases, have stated the law to be as there held: 1 Bishop on Marriage, Divorce, and Separation, secs. 1190, 1191; Pomeroy's Equity Jurisprudence, secs. 1299, 1300; 2 Kent's Commentaries, 146, note; Schouler, Domestic Relations, sec. 61, note. But those cases do not appear to us to rest on any satisfactory principle. It was apparently conceded by the lord chancellor in *Jenner v. Morris*, 3 De Gex, F. & J. 45, that they did not. He seems to have yielded to them simply as precedents which he was bound to follow. The earliest one, *Harris v. Lee*, 1 P. Wms. 482, on

which the subsequent ones rely, referred the jurisdiction, without much discussion or consideration of it, to the principle of subrogation. For reasons already given, we think that principle inapplicable. It is said that equity has jurisdiction, because there is no remedy at law. It is admitted that there is none at law. But it is contended that the defendant was bound to furnish his wife with necessaries; that the money which the plaintiff advanced to her was actually expended in good faith by her for necessaries; that it will be no hardship upon the defendant to be obliged to pay for necessaries which the law would have compelled him to furnish; and that in the interests of justice equity should compel him to pay the plaintiff the sums which she has advanced. In effect this is the same as saying that in equity money advanced to a wife living separate from her husband and for justifiable cause, and expended by her in good faith in the purchase of necessaries, should itself be regarded as necessaries, and recoverable accordingly. At law it is clear that money is not necessaries, and that a married woman living separate from her husband cannot borrow money on his credit to purchase necessaries. What is necessaries must be the same in equity as at law. It cannot be one thing on one side of the court and another thing on the other. There may be strong reasons why married women, compelled by their husbands' misconduct to live apart from them, should ⁴⁷⁷ be allowed to borrow money on their husbands' credit for the purchase of necessaries. It is for the legislature, if it deems it advisable, to give them such power. In this state that are not without a remedy in such cases. The probate court may, upon their petition, order the husband to pay to them from time to time such sums of money as it deems expedient for their support: Pub. Stats., c. 147, sec. 33 et seq. It is possible that this statute should be taken as a declaration of the legislative sense that a married woman living apart from her husband should obtain money for necessaries through the aid of the probate court, and not by pledging his credit. However that may be, a majority of the court can discover no satisfactory ground on which jurisdiction in equity of the present suit can rest.

Decree affirmed.

SUBROGATION—RIGHT OF VOLUNTEER TO.—A mere volunteer who has advanced money to discharge a lien is not entitled to be subrogated to the

rights of the lienholder: *Kleimann v. Gieselmann*, 114 Me. 437; 35 Am. St. Rep. 761, and note with the cases collected; *Desot v. Ross*, 95 Mich. 81.

HUSBAND AND WIFE—NECESSARIES—MONEY.—A husband is not liable for money loaned his wife although she may have used the same in procuring necessities: *Walker v. Simpson*, 7 Watta. & S. 83; 42 Am. Dec. 216, and note. See the extended note to *Cunningham v. Irwin*, 10 Am. Dec. 463, also the note to *Bergh v. Warner*, 28 Am. St. Rep. 366.

HOLDEN v. STARKS.

[159 MASSACHUSETTS, 503.]

BROKER'S COMMISSION—STATUTE OF FRAUDS.—A broker is entitled to his commission on a sale made by him for an owner of real property, though the purchaser never enters into any enforceable contract of sale, if, as a matter of fact, he was willing to comply with his oral contract, which was void by the statute of frauds, and his compliance was prevented by the refusal of the owner to receive the purchase price and make a conveyance of the property.

S. S. Taft, for the plaintiff.

C. L. Gardner, for the defendant.

503 KNOWLTON, J. By the terms of the report, if the verdict for the plaintiff was warranted by any evidence which was properly admitted, it is to stand; otherwise, it is to be set aside and judgment entered for the defendant.

It was proved, and not disputed, that the plaintiff made a contract of sale of the defendant's house and lot to one who for a long time afterward was able, ready, and willing to take the property and pay for it the price agreed, and who was prevented 504 from doing so by the defendant's refusal to carry out the contract. A payment of part of the purchase money was made to the plaintiff, with the intention of thereby rendering the contract irrevocable. If the plaintiff was authorized to make the sale as an agent employed by the defendant he is, under these circumstances, entitled to compensation, notwithstanding that the purchaser could not have been compelled to carry out his contract if he had chosen to set up the statute of frauds. It was the defendant's own fault that the sale was not consummated: *Cook v. Fiske*, 12 Gray, 491; *Desmond v. Stebbins*, 140 Mass. 339; *Witherell v. Murphy*, 147 Mass. 417; *Loud v. Hall*, 106 Mass. 404, 407; *McGavock v. Woodlief*, 20 How. 221; *Kock v. Emmerling*, 22 How. 69; *Duclos v. Cunningham*, 102 N. Y. 678; *Edwards v. Goldsmith*, 16 Pa. St. 43; *Prickett v. Badger*, 1 Com. B., N. S., 296.

It remains to inquire whether there was evidence from which the jury might find that the plaintiff made a sale as the agent of the defendant under an employment by him. The evidence on this point is indefinite and unsatisfactory, but there was uncontradicted testimony from the plaintiff, that, two or three years before the sale, the defendant, being informed that he was a real estate broker, told him to sell the property, if he could, at a price which was named, and that the plaintiff thereupon made some effort to sell it; that afterward, nearly a year before the sale, the defendant wrote him a letter, which was put in evidence, giving eighteen hundred dollars as the price of the property, and offering to pay him fifty dollars if he would sell it; and that just before the sale he telegraphed to the defendant, asking if he would sell the property for seventeen hundred dollars, and received in reply a dispatch, which was put in evidence, as follows:

“PORTLAND, ME., April 12, 1888.

“*To D. F. Holden:* No, eighteen is the least I will sell for.”

The plaintiff thereupon immediately made a contract of sale for eighteen hundred dollars, which the defendant refused to carry out. There is evidence in the case which tends to show that there was not a continuous employment of the plaintiff, but it would serve no useful purpose to review the testimony. In our opinion, the jury might well find that the plaintiff was acting under the authority of the defendant in making the contract of sale, and that he was entitled to compensation.

Judgment on the verdict. _____

BROKERS—WHEN ENTITLED TO COMMISSIONS.—This question will be found discussed in the extended notes to the following cases: *Kalley v. Baker*, 28 Am. St. Rep. 546; *Ward v. Cobb*, 12 Am. St. Rep. 589, and *Walter v. Osgood*, 93 Am. Dec. 175.

MERCHANTS' NATIONAL BANK v. CITIZENS' GAS LIGHT COMPANY.

[159 MASSACHUSETTS, 105.]

CORPORATIONS.—A NOTE SIGNED BY AN AGENT OF A CORPORATION authorized generally to give notes on its behalf is enforceable by a *bona fide* holder thereof, though the officer or agent exceeded his authority in executing the note in question.

CORPORATION.—THE AUTHORITY OF AN OFFICER TO SIGN NOTES on behalf of a corporation need not appear in the by-laws, nor be expressly given by a vote of the trustees or stockholders.

NEGOTIABLE NOTES—AUTHORITY TO EXECUTE.—If a corporation permits its treasurer to act as its fiscal agent, and holds him out to the public as having the general authority implied from his official name and character, and by its silence and acquiescence suffers him to draw drafts, and to indorse notes payable to the corporation, it is bound by his acts within the scope of such implied authority.

CORPORATIONS—PRESUMED AUTHORITY.—TREASURERS of manufacturing and trading corporations are clothed by virtue of their office with power to act for the corporation in making, accepting, indorsing, issuing, and negotiating promissory notes and bills of exchange, and such a negotiable instrument in the hands of an innocent purchaser for value, who has taken it without notice of any want of authority on the part of the treasurer, is binding on the corporation, although with reference to the corporation it is accommodation paper.

CORPORATIONS—NEGOTIABLE INSTRUMENTS.—THE TREASURER OF A GAS-LIGHTING CORPORATION IS PRESUMED TO HAVE AUTHORITY by virtue of his office to execute negotiable promissory notes which will bind the corporation. It is to be regarded as a manufacturing corporation, and its treasurer as invested with the same powers as treasurers of other manufacturing corporations.

A CORPORATION IS ESTOPPED TO DENY that the person executing a negotiable instrument as its treasurer was such treasurer, and that his acts within the implied power of his office are binding upon it, when he took possession of the office under a pretended election, and was permitted, without objection on the part of the corporation, or any of its stockholders, to continue in discharge of the duties of the office, and his election was ultimately ratified by the corporation and its stockholders after the execution of the note in question.

W. L. Russell, for the defendant corporation.

H. R. Bailey, for the plaintiff.

⁵⁰⁵ **BARKER, J.** 1. The defendant corporation's first request for instructions relates to the effect of Statutes, 1886, chapter 846, upon the powers of that corporation to issue promissory notes. The third section of that statute relates to the issue of bonds by a gas ⁵⁰⁶ company, and gives the company the right to secure bonds issued in accordance with the provisions of the section, by a mortgage of the franchise and

property of the company; but we find nothing in the chapter which affects the right of such a company to issue promissory notes when convenient or necessary in the prosecution of its business.

2. As the plaintiff discounted this note before maturity "in the usual course of its business, without notice or knowledge of any defect or infirmity," and as its good faith is not questioned, if the note were signed by an officer authorized generally to give notes on its behalf, the defendant corporation would be liable, although the agent, in signing this particular note, exceeded his authority, or the powers of the corporation: *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; 3 Am. Rep. 322. It is not necessary that the authority of an officer or agent to sign notes in behalf of a corporation should appear in the by-laws, or should have been expressly given by a vote of the directors or of the stockholders. In *Lester v. Webb*, 1 Allen, 34, it was said: "The rule is well settled that if a corporation permit their treasurer to act as their general fiscal agent, and hold him out to the public as having the general authority implied from his official name and character, and by their silence and acquiescence suffer him to draw and accept drafts, and to indorse notes payable to the corporation, they are bound by his acts done within the scope of such implied authority: *Fay v. Noble*, 12 Cush. 1; *Williams v. Cheney*, 3 Gray, 215; *Conover v. Mutual Ins. Co.*, 1 N. Y. 290. On the facts proved at the trial, the plaintiff might well claim, if the jury believed the evidence, that the treasurer had authority to indorse the notes in suit, derived, not from any express direction, but from the course of conduct and dealing of the treasurer with the knowledge and implied assent of the directors of the corporation": See, also, *McNeil v. Boston Chamber of Commerce*, 154 Mass. 277, 285; *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192.

3. But cases where the actual authority of an officer is inferred from a course of business known to and permitted by the stockholders or the directors of a corporation, do not touch the question whether authority is to be implied, as matter of law, from the name and nature of the office itself. In the present ⁵⁰⁷ case the jury were instructed that the treasurer of such a corporation as the defendant company, has, by virtue of his office, authority to sign a note which shall bind the corporation, and the defendant contends that this instruction was incorrect.

The incidental powers of some officers or agents have become so well known and defined, and have been so frequently recognized by courts of justice, that certain powers are implied as matters of law in favor of third persons who deal with them on the assumption that they possess these powers, unless such persons are informed to the contrary. The officers and agents usually mentioned in this category are auctioneers, brokers, factors, cashiers of banks, and masters of ships: See *Merchants' Bank v. State Bank*, 10 Wall. 604; *Case v. Bank*, 100 U. S. 446.

Treasurers of towns or cities in this commonwealth are well-known officers, and their powers are very limited. They are in general to receive, keep, and pay out money on the warrant of the proper officers of the towns and cities. Treasurers of business corporations usually have much more extensive powers, and the decisions of this court hold that the treasurer of a manufacturing and trading corporation is clothed by virtue of his office with power to act for the corporation in making, accepting, indorsing, issuing, and negotiating promissory notes and bills of exchange, and that such negotiable paper in the hands of an innocent holder for value, who has taken it without notice of any want of authority on the part of the treasurer, is binding on the corporation, although with reference to the corporation it is accommodation paper: *Narragansett Bank v. Atlantic Silk Co.*, 3 Met. 282; *Bates v. Keith Iron Co.*, 7 Met. 224; *Fay v. Noble*, 12 Cush. 1; *Lester v. Webb*, 1 Allen, 34; *Lowell Five Cents Sav. Bank v. Winchester*, 8 Allen, 109; *Bird v. Daggett*, 97 Mass. 494; *Monument National Bank v. Globe Works*, 101 Mass. 57; 3 Am. Rep. 322; *Corcoran v. Snow Cattle Co.*, 151 Mass. 74. While it is possible that most, if not all, of the cases in which this rule has been stated as law have some special circumstances from which the treasurer's authority could be inferred, and that the court was influenced in the decisions by the well-known facts that in many of the manufacturing corporations of this commonwealth the treasurer not only has the custody of the money, but is the general financial manager, and often the general ~~see~~ business manager of the corporation, the rule itself has been frequently and broadly stated in our decisions, and is well known both to the officers of manufacturing and trading corporations, and to those of banks and financial institutions. It could not now be abrogated or unsettled without disturbing commercial transactions. There are, however, many corpo-

rations which do more or less business to which the rule has been held not to apply. Thus it does not apply to a college: *Webber v. Williams College*, 23 Pick. 302; nor to a parish: *Packard v. First Universalist Society*, 10 Met. 427; nor to a monument association: *Torrey v. Dustin Monument Assn.*, 5 Allen, 327; nor to a municipality: *Lowell Five Cents Sav. Bank v. Winchester*, 8 Allen, 109; nor to a savings bank: *Bradlee v. Warren Five Cents Sav. Bank*, 127 Mass. 107; 34 Am. Rep. 351; nor to a horse railroad company: *Craft v. South Boston R. R. Co.*, 150 Mass. 207.

Upon consideration of the decisions cited, we think it fair to say that the making and indorsing of negotiable paper is to be presumed to be within the power of the treasurer of a manufacturing and trading corporation whenever, from the nature of its ordinary business as usually conducted, the corporation is naturally to be expected to use its credit in carrying on commercial transactions. Such paper is the usual and ordinary instrument of utilizing credit in commercial dealings, and it is for the interest of the corporation and of the community that the best instrument should be employed. It is no less for the interest of all that, if negotiable paper is to be employed, its validity should not be open to objections which would impair its usefulness by requiring at every step an inquiry into the authority by which it is issued.

There are matters of common knowledge pertinent to the present question. Gaslight companies like the defendant are chartered for the purpose of making and selling gas. They are located in every city of the commonwealth, and in most of the larger towns and villages. In the recent development of the use of electricity many electric light or light and power companies have been established where gaslight companies are in operation. The powers, obligations, and business of these electric companies are so similar to those of gaslight companies, that they are classed with them in the minds of business men, and are under ⁵⁰⁹ the supervision of the same state board.

We see no reason why, in respect to the present question, all of this general class of corporations should not be governed by one rule. They are all in fact "manufacturing and trading corporations" in the same sense that companies whose business it is to manufacture and sell cottons, woolens, shoes, or paper are manufacturing and trading corporations. None of these companies are traders in the strict sense contended

for by the defendant, since none of them make it their "business to buy merchandise or goods and sell the same." All of them, and the gaslight companies equally with the others named, buy merchandise and goods in large amounts, expend large sums in transforming, by their processes of manufacture, the articles purchased into other commodities which they sell for the purpose of making a profit. Neither the fact that the pipes which a gaslight company uses to deliver to its customers one of the commodities which it sells are laid under public authority, nor that the price of gas may be regulated by such authority, nor that the municipality in which its plant is located may purchase or take its franchise and property, makes it less advantageous or necessary that the gaslight company shall be able to use its credit in its commercial dealings. Although such companies manufacture only as they deliver, and so have no occasion to hold large quantities of manufactured goods for a market, there are features of their business which make it necessary for them to have control of large amounts of money at certain seasons. Coal, their chief raw material, is uniformly at its lowest price in the summer, and away from the seaboard is usually taken in in large quantities at that season. Gas is uniformly sold upon time, and the bills collected monthly or quarterly. The work of extending and repairing street mains and other work upon the manufacturing plant can be done to the best advantage during only a portion of the year. A business so conducted affords abundant scope for the advantageous use of the credit of the corporations engaged in it, and they would naturally be expected to use their credit in the transaction of their ordinary business. Their published returns made to the board of gas commissioners show that the companies do in fact issue large amounts of promissory notes. It is true that these notes may possibly have been issued under special votes or by-laws or other explicit ⁵¹⁰ authority. Upon this point we have no evidence or means of certain knowledge. But it is also true, and is a consideration entitled to weight, that the practice of gaslight companies to issue promissory notes has grown up since the announcement by the court of the rule that treasurers of manufacturing and trading corporations are presumed to have authority to issue such notes; and again, that gaslight companies are in fact manufacturing and trading corporations. The strong inference is that the gaslight companies and their officers, and those who have received in payment,

or bought or discounted their promissory notes, have in so doing acted upon the assumption that the rule as to the implied authority of treasurers of manufacturing and trading corporations to issue negotiable paper applied to the treasurers of gaslight companies. Those who have occasion to deal directly with such companies, or to purchase or discount their notes in the money market, would naturally assume that the rule so long applied by the court to other manufacturing and trading corporations would be applied to these. In our opinion, the same reasons which required the making of the rule referred to are operative here, and require us to hold that it is to be applied in the case of gaslight companies. We do not disregard the fact that such companies have peculiar duties to the public and peculiar privileges, and that their operations may be regulated by public authority, and their franchises and property taken over by the municipalities in which their works are located. But the situation of such a company with reference to this class of rights and obligations is the same, irrespective of the question whether its treasurer is or is not to be presumed to have power by virtue of his office to issue promissory notes. Such notes do not bind the franchises or the property of the company any more than debts upon open account. A majority of the court is therefore of opinion that the jury was rightly instructed that the treasurer of the defendant corporation, by virtue of his office, had authority to sign a note which would bind the corporation.

4. It is not necessary to consider in detail the numerous questions argued by the defendant corporation as to the admission and the exclusion of evidence, and the rulings given and refused, bearing upon the *status* of Ruggles as the treasurer *de jure* or *de facto* of the corporation, or upon the answers to the special questions ⁵¹¹ propounded by the court and answered by the jury in addition to the general verdict for the plaintiff.

Upon the uncontroverted evidence certain persons claiming to act as the stockholders of the corporation, all of whom were interested in its stock, assembled at its office on the day fixed in its by-laws as the date of its annual stockholders' meeting, and went through the forms of holding its annual meeting and of electing him treasurer of the company. The former incumbent of the office resigned it into the hands of Ruggles, and he has since filled the position of treasurer under a claim of a right to the office, and

without dispute on the part of any stockholder or member of the corporation, and no proceedings have been brought by the corporation itself to test his title to the office. The note in suit was issued when he had thus been in the unquestioned discharge of the functions of the office for nearly three months, and immediately thereafter at a meeting of which public notice was given his election was ratified and confirmed. No person in any way interested in the stock, either as a stockholder of record or as a purchaser or pledgee of untransferred certificates, has contested in any way his right to the office. The contention that he is not the lawfully elected treasurer has been made only by the corporation itself, and only as a technical defense to the present suit. Whatever might be the rule to be applied if a stockholder or member of the corporation, or the corporation itself, had contested the right of Ruggles in proceedings brought to test the validity of his original election, or of the subsequent ratification, and without holding that the rules which apply to *de facto* officers of government or of public or *quasi* public corporations, we are of opinion that under such circumstances the corporation itself cannot be permitted to contend, in defense of an action like the present, that the acts of a person who, under color of an election to the office, has, without protest or opposition from any source, acted as its treasurer for so long a time, are invalid, merely because the annual meeting at which he was chosen was not called in accordance with the by-laws. None of the exceptions relating to this branch of the case are, in view of the uncontroverted facts, material to the question whether the note in suit is a valid cause of action against the corporation, and they are overruled as immaterial.

Exceptions overruled. —

FIELD, chief justice, dissented. He insisted that the prior decisions in which it had been held that treasurers of manufacturing or trading corporations must be taken to have authority to sign promissory notes on behalf of the corporation were confined to corporations selling merchandise in the market and manufacturing the merchandise which they sell, and that gas-light companies were not commonly known as trading companies and did not sell goods, wares, or merchandise in the market. He was further of the opinion that the word "treasurer" did not of itself import that the person holding that office was the general business manager of the corporation, but only that he was authorized to receive and disburse its moneys, and that it was not shown that treasurers of similar corporations generally exercised the power to give promissory notes in behalf of such corporations. He was, therefore, of the opinion that no principle of public policy required the court to hold that the treasurer of such a corporation has implied power to sign

negotiable instruments when, in fact, he has not such power and has not been held out by the corporation or its directors as having it, or when it does not appear that treasurers of similar corporations have customarily exercised such power so publicly and uniformly that the court can take judicial notice of it.

CORPORATIONS.—ESTOPPEL TO DENY AGENT'S AUTHORITY.—In an action against a corporation on a note signed in its name by its president, secretary, and treasurer, without express authority from, or ratification by, the corporation, it is estopped from asserting that such officers acted outside of their authority, if it appears that all of the business of the corporation, including the kind in question, has universally been transacted by such officers and informally ratified by the corporation: *Duggan v. Pacific Boom Co.*, 6 Wash. 593; 36 Am. St. Rep. 182, and note with the cases collected. See the extended note to *Simpson v. Garland*, 39 Am. Rep. 299. It is not necessary that the charter of a corporation should confer the power of contracting by agent in order to give it that right, as all corporations must of necessity act through agents: *St. Andrews etc. Land Co. v. Mitchell*, 4 Fla. 192; 54 Am. Dec. 340, and note. An authorized agent of a corporation may bind the corporation by an unsealed contract without express authority in its charter: *Commercial Bank v. Newport Mfg. Co.*, 1 T. B. Mon. 13; 35 Am. Dec. 171, and note.

CORPORATIONS.—AUTHORITY OF OFFICER.—Drafts accepted by the treasurer of a corporation are presumed to be properly accepted by the corporation: *Credit Co. v. Howe Machine Co.*, 54 Conn. 357; 1 Am. St. Rep. 123, and note. As to when corporations are bound by notes executed by their officers, see *Reeve v. First Nat. Bank*, 54 N. J. L. 208; 33 Am. St. Rep. 675, and note.

DRUMMOND v. CRANE.

[159 MASSACHUSETTS, 577.]

CONTRACTS, WHEN BINDING AFTER DEATH OF THE CONTRACTOR.—A contract made to induce the organization of a water company, agreeing to take a specified amount of water per annum for ten years and to pay therefor a price designated in the contract, continues obligatory after the death of the contractor, and renders his estate liable for the price of the water to be taken by him during the years contemplated by the contract.

THE MEASURE OF DAMAGES FOR THE REFUSAL OF A DECEASED CONTRACTOR to take water of a specified value for a term of years is not necessarily the amount agreed to be paid for such water, though the cost of delivering it is nothing. There should be deducted from the amount agreed to be paid such sums as the water company has received from the use of the water on the premises on which its use was contemplated at the making of the contract, though such premises no longer belong to such contractor nor to his estate.

T. P. Pingree and C. E. Burke, for the plaintiff.

M. Wilcox and A. C. Collins, for the defendants.

577 HOLMES, J. This is an action of contract on the following writing:

"NEW YORK, June 11th, 1888.

M. J. Drummond,

DEAR SIR: I hereby agree to enter into a formal contract with the ⁵⁷⁸ Housatonic Water Company when organized, binding myself to take at least seven hundred and fifty (\$750) dollars' worth of water per annum for the period of ten years on the following basis: Water for manufacturing purposes 12½ cents per 1,000 gallons, hydrants \$40.00 per annum each, private dwellings, one tap for one family, \$8.00 per annum. In the construction of these water works they are to commence at Long Pond with a 14 inch pipe and continue with a 12 inch pipe, then reducing to 10 inch, then to 8 inch to the village, and using 6 inch and 4 inch distribution pipes.

C. R. CRANE."

This writing was signed in order to induce the plaintiff to build an aqueduct for the stock and bonds of the Housatonic Water Company, and the offer contained in it was made in consideration of the plaintiff's doing so. The plaintiff accepted the offer, furnished the consideration, and the promise became a binding contract. Just afterward Crane died, and his administrators refused to perform the contract. The first question is whether the administrators were bound to pay for the ten years, as agreed by Crane.

The question is not whether the administrators are bound by their intestate's contract. They are bound by it of course, whether named or not, because they represent his person: *Shelley's case*, 1 Coke, 93, 96 a; *Iremonger v. Newsam*, Latch, 260, 261; *Day v. Worcester etc. R. R. Co.* 151 Mass. 302, 308. A sufficient proof is that they unquestionably would be liable for a breach by their intestate in his lifetime. The true question is whether the contract properly construed requires a continuance of the promised action beyond the lifetime of the promisor. It is the same question, and is to be answered in the same way, as if the promisor himself were alive for purposes of being sued, but dead for the purposes of performance.

The facts relied on by the defendants are, that, as the plaintiff knew, the reason why Crane wanted the water was that he might use it in his business; that his business was the manufacture of woollens under a lease and business arrangement with the Monument Mills; and that by the terms of his lease the mills had a right to terminate it, and did terminate it in fact within three months of Crane's death. The plaintiff

knew ⁵⁷⁹ the kind of business in which Crane was engaged, and that it was carried on under some arrangement with the Monument Mills, but did not know what the arrangement was.

But the motives which induced Crane to make the promise are not so important an aid in determining its scope as the object which the plaintiff manifestly had in exacting it. It was perfectly plain that the reason why the plaintiff required the promise as a condition of making his investment and building the reservoir was that he might have some security for returns. The plaintiff committed himself absolutely to the investment, whether Crane lived or died. Obviously the security which he wanted was one equally independent of Crane's life. From the point of view of the plaintiff, the contract was like a guaranty upon executed consideration that he should have so much business for a certain time, which, of course, would run on whether the guarantor lived or died: See *Lloyd v. Harper*, L. R., 16 Ch. Div. 290. It may be that it was prudent administration for the defendants to break the contract and to pay the damages, but we are of the opinion that Crane's undertaking was to take the water for ten years, dead or alive. Very possibly he did not think of the chance of his dying, and might have hesitated if the present aspect of his contract had been called to his attention. But the circumstances and the words used gave notice of the extent of the obligation which he was entering into, and if we are to conjecture, it is as probable as any thing else that the plaintiff would not have accepted less than by our construction he got. No cases very like the present have been called to our attention. We may mention *Kernochan v. Murray*, 111 N. Y. 306; 7 Am. St. Rep. 744; *Chamberlain v. Dunlop*, 126 N. Y. 45; 22 Am. St. Rep. 807; *Billings' Appeal*, 106 Pa. St. 558; and *Martin v. Hunt*, 1 Allen, 418, 419.

The considerations which we have put forward are not affected by the fact that the contract sued upon contemplated another more formal contract. That is merely an additional wheel in the machinery. Nor does it matter that the second contract would be made with another party. It was expected that the plaintiff would become the owner of substantially all the stock of the water company when it was issued, and he did so, so that his interest was substantially the same with reference to the present question as if it had been agreed that the second contract should run to him.

⁵⁸⁰ The other question reserved by the report concerns the measure of damages. The judge who tried the case, without a jury, found that the cost of delivering the water was nothing, and ruled that the plaintiff was entitled to recover the present value of each yearly payment, deducting such sums as the water company received or ought to have received for water used upon the premises occupied by Crane at the time of his decease. Only the plaintiff complains of this ruling. We have no doubt that the defendants are right in conceding that the plaintiff is entitled to recover substantial damages, subject to any just deductions. It does not matter how the contractee is interested to have a contract performed, whether directly or because he is a stockholder in a corporation if he is interested. It has been held in England that trustees can recover to the extent of the interest of their *cestuis que trust*: *Lloyd v. Harper*, L. R., 16 Ch. Div. 290. Also the intended intervention of a second contract is not important: *Pratt v. Hudson River R. R. Co.*, 21 N. Y. 305; *Driggs v. Dwight*, 17 Wend. 71; 31 Am. Dec. 283.

The matter of the deductions is more difficult to deal with. Even if the contract were as broad as upon this question the plaintiff's interest would have it regarded, some circumstances can be imagined which would make the damages only nominal at most. The object being, as we have said, to secure the plaintiff a return for his investment by guaranteeing a certain amount of custom, if the plaintiff's company had customers for all the water which it could furnish, only nominal damages ought to be allowed. The same consideration of the object of the contract points also to some latitude of construction as to what constitutes performance. If the contract had specified the buildings in which the water was to be taken, there could be no doubt that the ruling was right. The contract would mean not that Crane personally would take so much water at all events, but that so much water should be taken in those buildings. The contract does not specify any buildings, but still we are of opinion that it does not require a personal taking of the water throughout the ten years. It is satisfied if the taking was started by Crane, and its continuance fairly may be attributed to him. When the contract was made, both parties understood that Crane made it for the sake of his factory in the building of ⁵⁸¹ the Monument Mills.

If Crane in his lifetime had taken water there, and after

his death his administrators had done the same, and then within the ten years the factory had changed hands, and the same amount of water was taken afterwards, it would be a hard construction to deny that the contract adopted in advance Crane's choice of place to the extent that a continuous taking of water in the same place was a performance. The obligation to take the water would not follow Crane's person and estate so far as to bind the administrators to take water in another place in addition. So, if Crane, after taking water, himself had sold the factory. Things had not gone quite so far as we have supposed, because Crane died just before the water was ready for delivery. Yet it seems very plain, and, as we take it, was inferred by the judge who tried the case, that the places in respect of which the judge made the allowances were understood by both parties to be places at which the water was to be delivered. No doubt Crane was free to change his place of performance, but a taking at the factory satisfied the contract *pro tanto*. As to the sums allowed by the judge for water furnished to the two tenements of the Crane estate, the facts do not appear in any detail. We cannot say that the allowance was not right upon the principles which we have explained.

No objection has been raised to the recovery in this action of all the damages which ever can be recovered, although the ten years have not elapsed. It seems to be assumed that the case is governed by *Paige v. Barrett*, 151 Mass. 67, and the cases there cited. We do not disturb the assumption. If it be made, the deductions to be allowed on account of earnings in the future must be matters of estimate.

Judgment on the finding.

CONTRACTS—WHETHER ENFORCEABLE AFTER DEATH OF CONTRACTOR.—This question will be found thoroughly discussed in *Chamberlain v. Dunlop*, 126 N. Y. 45; 22 Am. St. Rep. 807, and the monographic note thereto.

PARROTT v. AVERY.

[159 MASSACHUSETTS, 594.]

A DEED IS NOT DELIVERED though it is executed in the presence of a witness, if there is no declaration on the part of the grantor that he intends it to take effect at once, and he retains it in his possession during his lifetime, putting it in a chest and bequeathing the chest to the grantee.

WILLS.—A DEVISE OF LAND CANNOT RESULT FROM A BEQUEST OF A CHEST AND ITS CONTENTS, though a part of such contents is an undelivered conveyance from the testator to the legatee.

WRIT of entry for a parcel of land in Great Barrington. The land had formerly belonged to Miles Avery, to whose title the tenant claimed to have succeeded under a deed dated January 21, 1888, purporting to be made in consideration of love and affection. This deed was executed in the presence of a witness, and at the death of the grantor was found in a chest. The grantor had bequeathed to the grantee in the deed this chest "and its contents except bank-books." This will was dated May 25, 1889, and, in pursuance of its provisions, the executor delivered the chest and its contents, including the deed, to the legatee, who thereafter, in January, 1893, caused the deed to be recorded. The demandants in the action claimed title under the seventh clause of the testator's will directing that all the residue and remainder of his estate, both real and personal, not otherwise disposed of, be divided among all his grandchildren then living.

H. C. Joyner, for the tenant.

A. C. Collins, for the demandants.

595 ALLEN, J. 1. That the agreed facts fail to show a delivery of the deed in the grantor's lifetime. The grantor retained control of the deed and of the land. There was no prior bargain with the grantee, and no indebtedness to him, nor relation of trust towards him. He had no knowledge of the execution of the deed. The only consideration was love and affection. The deed was not recorded during the grantor's lifetime. There was no oral declaration by the grantor that he meant to have it take effect at once. In short, there was nothing tending to show a delivery of the deed except the bare fact that it was executed in the presence of a witness. The question of delivery is a question of fact, and delivery in the grantor's lifetime must be proved. There must have been an intention that it should 596 operate as a present

conveyance of title. A finding of the delivery of the deed would not be warranted on the agreed facts: *Stevens v. Sterens*, 150 Mass. 557; *Shurtleff v. Francis*, 118 Mass. 154; *Hawkes v. Pike*, 105 Mass. 560; 7 Am. Rep. 554; *Brabrook v. Boston Five Cents Sav. Bank*, 104 Mass. 228, 232; 6 Am. Rep. 222; *Chase v. Breed*, 5 Gray, 440; *Younge v. Guilbeau*, 3 Wall. 636, 641; 3 Washburn on Real Property, 5th ed., 577 et seq. There were no acts or declarations of the grantor sufficient to show an intent to treat it as delivered, or circumstances such as were found to be sufficient in *Lowd v. Brigham*, 154 Mass. 107, 113, 114, and cases there cited, and in *Regan v. Howe*, 121 Mass. 424.

2. Even though it be assumed that the undelivered deed was in the chest when the will was signed, the gift in the will of "my chest and its contents except the bank-books" does not operate as a devise of the land.

The danger of using words of this kind in a will is pointed out by Chitty, J., in *Robson v. Hamilton*, L. R. [1891] 2 Ch Div. 559, because an article may be in the chest one day and out of it the next, or may be put there for safe-keeping during the testator's last illness by somebody who is taking care of the things which are found lying about. Moreover this form of gift, if it speaks from the death of the testator, would enable him to increase or diminish his gift at pleasure by putting things into the chest or taking them out from time to time; thus accomplishing what cannot be done by referring in the will to a separate paper thereafter to be prepared and signed by the testator: *Thayer v. Wellington*, 9 Allen, 283; 85 Am. Dec. 753. However, this aspect of the case need not be dwelt on, because the words of the gift are not sufficient to carry the land even though it was clearly proved that the deed was in the chest all the time. The reason of this is that the deed is not to be considered as property in itself, but evidence of title to property situated elsewhere. Land cannot be deemed to be included amongst the contents of a chest, merely because a deed conveying it or an undelivered deed describing it is contained therein. Many cases are to be found in the books where questions have arisen whether gifts of goods, or chattels, or property, or things contained in or the contents of a certain place, or house, or closet, or cabinet, or desk, or trunk, should be held to include money, bonds, promissory notes, banker's receipts, or other similar articles of personal property, and the ⁵⁹⁷ decisions have not been

uniform: See cases cited in 1 Jarman on Wills (Bigelow's ed.), 709 et seq.; Wms. Ex., 6th Am. ed., 1178 et seq., Theobald, Wills, 3d ed., 145; *Penniman v. French*, 17 Pick. 404; 28 Am. Dec. 309; *Lock v. Noyes*, 9 N. H. 430. But no case has been cited by counsel or found by us in which it has been held that land would pass under such a gift by reason of a deed thereof being found amongst the contents of the place or receptacle designated. On the other hand, title deeds have been selected as the most striking illustration of what would not pass under such general words: *Brooks v. Turner*, 7 Sim. 671; *Robson v. Hamilton*, L. R. [1891] 2 Ch. Div. 559, 565, 566. And a mortgage has been expressly held not to be so included in *Fleming v. Brook*, 1 Schoales & L. 318, and *Brooks v. Turner*, 7 Sim. 671. It is not as if the testator in his will had made a gift of the deed in express terms, or had directed it to be delivered to the tenant. That would have presented a different question.

It is of course possible that the testator may have mistakenly supposed that his undelivered deed to the tenant would be effectual to convey the land after his own death. If that was so, it might be a reason why he did not give the land to the tenant by his will; but it would not change the construction of the will itself, and enlarge the meaning of the words used, so as to make the land pass under the gift of the chest and its contents.

Judgment for demandants affirmed.

DEEDS—DELIVERY—WHAT IS NOT.—Where a deed is executed and acknowledged, ready for delivery, but was not delivered, but was laid away in the grantor's drawer with his will and is found there after his death, it is inoperative, never having been delivered: *Lang v. Smith*, 37 W. Va. 725; *Jackson v. Dunlop*, 1 Johns. Cas. 114; 1 Am. Dec. 100; *Jones v. Jones*, 6 Conn. 11; 16 Am. Dec. 35, and note; *Taft v. Taft*, 59 Mich. 185; 60 Am. Rep. 291. When a grantor in a deed hands it to the grantee, telling him to "take this deed and put it in our box at the bank" this does not constitute a present delivery of the deed to the grantee: *Hayes v. Boylan*, 141 Ill. 400; 83 Am. St. Rep. 326, and note. Handing a deed to the grantee to be put into a trunk containing the joint papers of the grantor and grantee, they being partners, and the grantor keeping the key, is not a valid delivery: *Chadwick v. Webber*, 3 Greenl. 141; 14 Am. Dec. 222. To constitute delivery of a deed the grantor must divest himself of all power and dominion over it: *Denis v. Velati*, 96 Cal. 223; *Wood v. Ingraham*, 3 Strob. Eq. 105; 51 Am. Dec. 671. See the extended note to *Fain v. Smith*, 58 Am. Rep. 289.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

**KREMER v. CHICAGO, MILWAUKEE, AND ST. PAUL
RAILWAY COMPANY.**

[51 MINNESOTA, 15.]

LICENSE TO OCCUPY LAND, NOT BINDING ON PURCHASER WHEN.—A license to a railroad company to enter and occupy land is a protection for any acts done under it, but a sale of the land constitutes a revocation of the license, and the vendee is entitled immediately after the transfer to bring his action to recover possession of the strip so occupied.

RAILROAD COMPANIES OCCUPYING LAND UNDER LICENSE, WHEN DEEMED TRESPASSERS.—The entry and occupation of land by a railroad, and the construction of its road, under a license from the landowner, does not operate as an appropriation of the land so occupied, nor divest the title of the landowner. That title passes to a purchaser of the premises, and as to him the railroad company is a naked trespasser.

LIMITATIONS OF ACTIONS—EFFECT OF LAPSE OF TIME.—A plaintiff's right to avail himself of a legal remedy is not impaired merely by inaction or delay in seeking that remedy.

EMINENT DOMAIN—ASSESSMENT OF DAMAGES UPON ENTIRE TRACT.—A landowner is entitled to have his compensation assessed for the injury to the entire tract of which the land appropriated by proceedings in eminent domain forms a part. Mere artificial or nominal lines of division are not material where the several lots or parcels are contiguous, and are held and used for a common purpose, so that they may properly be treated as an entirety for the assessment of the compensation.

RAILROAD COMPANIES—OCCUPATION OF LAND WITHOUT LEGAL RIGHT—EJECTMENT—PLEADING.—In an action by a landowner to recover damages for the trespass of a railroad company in constructing its road without having obtained the right to do so, either by grant or proceedings in eminent domain, the defendant is entitled to withdraw a portion of its answer in which it seeks to obtain a condemnation of the land alleged to be the right of way strip, but a mere motion for leave to make such withdrawal is to be regarded as an application addressed to the discretion of the trial judge, whose ruling will not be interfered with by the appellate court unless he has been guilty of an abuse of discretion.

A. C. Dunn, John W. Cary, and H. H. Field, for the appellant.

Daniel Buck and D. F. Morgan, for the respondent.

1st *VANDEBURGH, J.* The plaintiff alleges that he is, and for more than three years has been, the owner of a tract of land in Blue Earth county, containing upwards of thirteen hundred acres, which is traversed by the defendant's railway. The railroad was constructed upon and **2nd** over the land before plaintiff acquired title; but it never obtained the lawful right so to do, by condemnation proceedings or otherwise, and has never paid any compensation for the land occupied by it, or for the damages caused by the construction and operation of its railway thereon. He therefore seeks by this action to recover possession, to eject the defendant from the premises, and for damages caused by the occupation thereof. The answer takes issue upon the allegations of plaintiff's ownership, and also alleges "that the predecessors in interest of the defendant entered upon and built the railroad over and across the said lands with the full knowledge, consent, and acquiescence of the then owners of the same, and that ever since its purchase and operation of the said railroad it has continued to use and occupy the said strip of land for its railway purposes until the commencement of this action, without notice from the plaintiff or other persons that its use and occupation thereof was in any manner unlawful, and without objection from the plaintiff or other persons; that the piece of railroad, built and constructed as aforesaid is a part of its line of railway from Wells to Mankato, and is necessary to the proper enjoyment of its rights and franchises, and to the discharge of its duty to the public as a carrier of freight and passengers." It also alleges that it is ready and willing to make compensation for the damages arising from the appropriation of the land in question, and therefore asks that they be ascertained, as provided by the statute, by the jury in this action, if the plaintiff, on the trial, shall establish his right to recover the said strip of land.

1. The evidence sustained the allegations of plaintiff's title and ownership, and there was no evidence in the case tending to show that defendant's occupancy of the premises was lawful, except that the same was by the license, express or implied, of the grantors of the plaintiff.

If the original entry or subsequent occupancy of the prem-

ises, to the time of plaintiff's purchase, was by the license of the grantors of the plaintiff, such license is a protection for any acts done under it; and in any event the plaintiff would have no right of action for use and occupation, or trespasses committed by defendant in the construction ²¹ or operation of its road thereon prior to his purchase, unless he had acquired such right by assignment. It did not pass by the conveyance of the land.

But such license, if any there was, was subject to be revoked at any time by the licensor; and thereafter the defendant would become a trespasser, and the landowner would be entitled to his remedy either in trespass or ejectment, as he might be advised. The sale and conveyance of the land to the plaintiff was by itself a revocation of any previous license, and the plaintiff had a right immediately thereafter to bring his action to recover the possession: *Eggleston v. New York etc. R. R. Co.*, 35 Barb. 162; *Miller v. Auburn etc. R. R. Co.*, 6 Hill, 61; 2 Am. Lead. Cas., 5th ed., 576; *Johnson v. Skillman*, 29 Minn. 95; 43 Am. Rep. 192. Plaintiff's right of action is not impaired by his inaction or delay in seeking his legal remedy. Defendant acquired no rights in the land or to the possession by its entry and occupation. On the contrary, it has been a continuous trespasser, except as to acts done under the license. The contention of the defendant that by its entry and possession and the construction of its road, it lawfully appropriated the land, and that the right to compensation therefor accrued to the plaintiff's grantor, finds no support in the decisions of this court. The title was never divested. It passed to the plaintiff, and as to him the defendant is simply a trespasser; and it can only acquire the right to use the same by grant or condemnation proceedings, as provided by law: *Lamm v. Chicago etc. Ry. Co.*, 45 Minn. 73, 77; *Galway v. Metropolitan Elev. Ry. Co.*, 128 N. Y. 132.

The plaintiff was clearly entitled to recover the premises in question unless the defendant availed itself of its privilege under the statute of having its damages assessed in the same action.

2. The court having denied defendant's application to withdraw the claim set up in its answer for an assessment of damages as for a condemnation of the land, the case was heard and disposed of upon the merits of such application, and a verdict rendered, assessing the damages accordingly.

²² The right of way claimed by defendant and occupied by

it extends through seven forty-acre tracts or government subdivisions. It claims that plaintiff's damages should be limited to those tracts actually crossed by the railway and those which, at the time of the construction of the road, were part and parcel of the tracts so crossed, so as to form therewith entire tracts or bodies of land owned by one common owner. The court, however, left it to the jury to determine from the evidence whether the body of land in question, claimed and owned by the plaintiff when the action was brought, and at the time of the trial, was so situated, occupied, and used, taken together, as to constitute one farm. It is a well-established rule that the owner is entitled to have his compensation or damages assessed for the injury to the entire tract of which the land appropriated is a part, and mere artificial or nominal lines of division are not material where the several lots or parcels adjoin, and are held and used for a common purpose, so that they may properly be treated as an entirety for the assessment of damages. The evidence tended to show that the whole tract in this case constituted one farm; and though very large in extent, we are not prepared to say that the question was not properly left to the jury. It was for the jury to ascertain the extent and nature of the injury, subject to the rules of law; and if some portions were not affected at all, and some less than others, these were matters which they would be expected to consider in making up their estimate. The court also properly instructed the jury that the damages were to be assessed as of the time of the trial. The condition of the property and state of the title at that time must govern in determining the amount of plaintiff's compensation. It was not material, therefore, that plaintiff's farm had been enlarged by the purchase of adjacent tracts subsequent to the construction of the road, and prior to the condemnation proceedings. Whether the land in question constituted at the time of the trial one tract or farm, and the extent which the whole or any portion thereof might have been injured, were questions for the jury. It is clear that a body of land may be so large, though owned by one person and used for a common purpose, that all portions of it would not be injuriously affected, ²³ and the line would have to be drawn somewhere within reasonable limits; but this would necessarily be determined upon the evidence disclosing the facts and circumstances in each particular case. In this case the damages

assessed appear to be very large, but the amount thereof is not among the errors assigned on this appeal.

3. At the trial, before any testimony was introduced, the record shows that "the defendant moved the court for leave to withdraw all that portion of its answer that seeks to obtain a condemnation of the land alleged to be the right of way strip; thereby leaving the issue to be tried as originally made by the complaint, with the denials of the answer." This application, respondent claims, should be interpreted as an application to the court to amend the answer by striking out and eliminating therefrom the claim for an assessment of damages under the statute. Upon the argument in this court, the defendant's counsel insists that it was entitled to abandon the condemnation proceedings as a matter of strict legal right. And this is, we think, the correct view of the law. It differs from the case of *Witt v. St. Paul etc. Ry. Co.*, 35 Minn. 404, for the reason that in this case such abandonment leaves plaintiff's remedy wholly unimpaired in the suit already pending, for the recovery of his property with damages—just the remedy he asks for, and is entitled to by law, if he is the owner and there is to be no condemnation. It resembles the case of an ordinary counterclaim in an answer, which the defendant may withdraw before or at any time during the trial, upon the proper notice or order of the court, filed or made part of the record: *Brown v. Butler*, 12 N. Y. Supp. 810. But the majority of the court is of the opinion that the defendant did not, by its application, withdraw or show an intention to assert its legal right to withdraw its statutory claim for an assessment, but that it was an application in form addressed to the discretion of the trial judge, and he would have a right to so consider it and dispose of it; and so considered, there was no abuse of discretion in denying it. But I am inclined to think that it was error, because the defendant had the right to abandon, and the application should be deemed as a motion to have the claim for an assessment expunged from the ²⁴ record, so as to show such withdrawal; and such motions, when the legal rights of the parties are clear, should not be given a strict or technical construction, or deemed discretionary merely.

This disposes of all the assignments of error which we deem necessary to consider.

Order affirmed.

LICENSE—REVOCATION BY SALE OF PREMISES.—A simple parol license may be revoked at any time by the licensor, and is revoked by a sale of the real property involved: *Metcalf v. Hart*, 3 Wyo. 513; 31 Am. St. Rep. 122, and note; extended note to *Lawrence v. Springer*, 31 Am. St. Rep. 714.

LICENSE—TITLE DOES NOT PASS BY OCCUPATION OF LAND UNDER.—License is authority to do some act or series of acts on another's land without passing any estate therein: *Clute v. Carr*, 20 Wis. 531; 91 Am. Dec. 442; *Mumford v. Whitney*, 15 Wend. 380; 30 Am. Dec. 60, and note; *Riddle v. Brown*, 20 Ala. 412; 56 Am. Dec. 202; *Wynn v. Garland*, 19 Ark. 23; 68 Am. Dec. 190; *Rhodes v. Otis*, 33 Ala. 578; 73 Am. Dec. 439.

EMINENT DOMAIN—DAMAGES UPON ENTIRE TRACT.—When part of several contiguous town lots used and treated by the owner as one tract is appropriated by a railroad company for a right of way, he is not limited in his recovery to the land described in the petition of the company, but may show the direct effect upon all of his land flowing from such appropriation: *Atchison etc. R. R. Co. v. Boerner*, 34 Neb. 240; 38 Am. St. Rep. 637, and note with the cases collected.

LIMITATIONS OF ACTIONS—EFFECT OF LAPSE OF TIME.—One who commences an action within the time allowed by the statute of limitations cannot be denied relief on the ground of laches: *Cartright v. McGown*, 121 Ill. 388; 2 Am. St. Rep. 105; *Lang Syne etc. Min. Co. v. Ross*, 20 Nev. 127; 19 Am. St. Rep. 337.

MINNEAPOLIS CO-OPERATIVE Co. v. WILLIAMSON.

[51 MINNESOTA, 58.]

LANDLORD AND TENANT—TENANT NOT LIABLE FOR RENT AFTER SURRENDER OF PREMISES, WHEN.—A tenant, who exercises an option which his lease gives him to continue his tenancy after the expiration of the term, cannot terminate his tenancy, at his mere election, before the end of the year, but is not liable for rent accruing after a surrender of the premises which is accepted by the landlord.

LANDLORD AND TENANT—REMAINING IN POSSESSION AFTER CONSTRUCTIVE EVICTION, EFFECT OF.—A tenant is not obliged, upon the occurrence of the first neglect of duty on the part of the landlord which would justify a surrender of the premises, to elect immediately between an abandonment and a retention of the possession. Whether his omission to avail himself of his right to surrender was unreasonable under the circumstances is a question for the jury.

LANDLORD AND TENANT—ACTION FOR RENT—DEFENSES NOT INCONSISTENT. In an action for rent, an answer alleging that the landlord accepted the tenant's surrender of the premises and resumed possession, and also that the tenant abandoned the premises because of their untenable condition, is not open to the objection that it embodies inconsistent defenses.

ACTION for rent. The defenses relied upon in the answer referred to in the opinion of the court were: 1. That the defendant was holding the premises under a month to month tenancy, and had given due notice of his intention to quit;

2. That he had surrendered the premises to the plaintiff, who had accepted the surrender; 3. That the plaintiff was guilty of certain omissions which amounted to a constructive eviction of the defendant. The trial judge charged the jury that the tenancy was from year to year, and submitted to them the questions whether there had been a surrender of the premises and an acceptance thereof, and, if not, whether an abandonment was justifiable under the circumstances. The defendant had judgment.

R. B. Forrest, for the appellant.

Hart and Brewer, for the respondent.

⁵⁴ DICKINSON, J. The plaintiff leased to the defendant certain rooms in the eighth story of a building or block for the term of one year ⁵⁵ from May 1, 1889, the lessee having the option to continue the tenancy for two years longer, by giving notice before the expiration of the first year. No such notice was given, but the defendant remained in actual occupancy until about the middle of January, 1891, as is admitted, and remained legally in possession, paying rent, until February 28, 1891. The rent was payable monthly. This action is for the recovery of rent for the months of March and April, 1891, the last two months of the second year of the tenancy.

The plaintiff was not entitled to judgment on the pleadings. It may be conceded that the answer, in effect, admitted that the continued tenancy after the first year became a tenancy from year to year, so that the defendant could not terminate it, at his mere election, before the end of the year. But it was well averred, and constituted a defense, that he surrendered the possession to the plaintiff on the 28th of February, 1891, and that the latter accepted the same.

The defendant further alleged in defense an agreement in the lease on the part of the lessor, that the lessor should provide adequate steam heat for the warming of the premises, and that the only practical and reasonably convenient means of access to these rooms was by means of elevators in the building, controlled and operated by the lessor; that such steam heat and elevator service were essential to the comfortable occupancy or enjoyment of such rooms, but that "for a long time prior to the twenty-eighth day of February, 1891," the plaintiff failed to adequately warm the premises, as agreed, and failed to so operate the elevators as to afford reasonably convenient facilities of access to the same; that "for

many months prior to said twenty-eighth day of February," the plaintiff so negligently and carelessly maintained and operated the elevators, and so failed to supply heat, that its acts and negligence "amount to a constructive eviction of this defendant from said premises, and for the reasons aforesaid it became and was necessary for this defendant, in order to preserve his business interests, to abandon the same."

We do not understand from the brief of the appellant (although some of the assignments of error are of wider scope), that it calls in question the sufficiency of the defense last referred to, except on the ground that the right to make such a defense was waived by reason ⁵⁶ of the fact that the defendant remained in possession, recognizing the continuance of the tenancy long after the default on the part of the plaintiff in the two particulars referred to; and perhaps (for this is not very clearly presented in the brief) that this is inconsistent with the defense that the rented premises were surrendered to and accepted by the plaintiff, and hence that the defendant should have been compelled to make an election as between those defenses. The appellant treats this defense as falling under the provision of Laws, 1883, chapter 100, and relies upon the decisions in *Roach v. Peterson*, 47 Minn. 291, 462, in support of his contention. That act relates to cases where leased premises have been "destroyed" or "so injured by the elements, or any other cause, as to be untenable." It can hardly have any application in this case, in which no destruction or injury to the premises is alleged. In the case above cited there had been a partial destruction of the premises by fire, and it was held that under the statute cited, the tenant, if he would avail himself of the exemption from liability for rent which is allowed by that law, must exercise his election to do so, and surrender possession with reasonable promptness, which was considered not to have been done under the circumstances of that case. This case is different. While the statute above cited is not applicable, we assume, because in its brief the appellant does not contend to the contrary, that independent of the statute the facts referred to constituted a sufficient justification for the abandonment of the premises, and a defense which might be termed "a constructive eviction." Similar defenses have been sustained: See *Lawrence v. Burrell*, 17 Abb. N. C. 812; *Tallman v. Murphy*, 120 N. Y. 345. But we do not pass upon that. Upon the point as to whether the defendant waived his right of election by delay,

it is to be observed that the grievance was not that the property had been injured, or destroyed, or rendered untenable by reason of its own condition, as was the case with the burned building, but especially as respects the elevator service, and as the jury might consider, as respects the heating also, it was a mere neglect of duty on the part of the landlord which might be corrected at any time. It was not necessarily and always the same, but must have depended daily upon⁵⁷ the daily conduct of the landlord or his servants. The extent of the inconvenience which would be suffered could not be anticipated with certainty, for the extent of the neglect from day to day in the future could not be known. Hence it could not be said that the defendant was bound, on the occurrence of the first neglect, to at once make his election whether he would surrender the premises. It would be a question for the jury whether his neglect to avail himself of the right to do so had been unreasonable under the circumstances.

The two defenses were not inconsistent. It was quite possible for the defendant to have abandoned or surrendered the premises because of their untenable condition, and for the landlord to have accepted the surrender, and to have resumed possession. Probably the idea that there was any inconsistency in the defenses arose from the applicability and use of the legal term constructive eviction, in connection with the neglect referred to.

There was no exception to the refusal of the court to instruct the jury as requested at the end of the case: Folio 388.

Matters referred to in the assignments of error, but not alluded to in the brief, are not considered.

Judgment affirmed.

What Justifies the Tenant in Abandoning Leased Premises.

1. *The Fundamental Principles by Which the Rights of a Tenant to Abandon Demised Premises*, without the consent of his landlord, are governed are in no respect different from those which are applicable to the rescission of other contracts. As was observed by Chief Justice Tindal, in *Ison v. Gorton*, 5 Bing. N. C. 501, "the cases in which the tenant has been allowed to withdraw himself from the tenancy, and to refuse payment of rent, will be found to be cases where there has been either error or fraudulent misdescription of the premises which were the subject of the letting, or where the premises have been found to be uninhabitable by the wrongful act or default of the landlord himself." That the cases alluded to in the latter part of this citation come under the head of failure of consideration is sufficiently obvious, and it is so laid down in *Dyett v. Pendleton*, 8 Cow. 727, where the landlord was held by having created and maintained an intolerable nuisance, to have given the tenant a right to throw up the contract. Senator Spencer, after

examining some of the authorities, said: "The review of the cases now made shows that the principle on which a tenant is required to pay rent is the beneficial enjoyment of the premises, unmolested in any way by the landlord. It is a universal principle in all cases of contract, that a party who deprives another of the consideration on which his obligation was founded can never recover damages for its nonfulfillment. The total failure of the consideration, especially when produced by the act of the plaintiff, is a valid defense to an action, except in certain cases, where a seal is technically held to conclude the party. This is the great and fundamental principle which led the courts to deny the lessor's right to recover rent where he had deprived the tenant of the consideration of his covenant by turning him out of the possession of the demised premises. It must be wholly immaterial by what acts that failure of consideration has been produced; the only inquiry being, has it failed by the conduct of the lessor?" So also in the recent case of *Wilson v. Finch Hatton*, L. R. 2 Ex. D. 336, Kelly, C. B., and Pollock, B., put the right of the lessee of a furnished house to repudiate the contract, if the premises are unfit for occupation, upon the broad ground that, in such a case, he "does not get what he contracted for." The subject of the abandonment of demised premises might be treated on the lines suggested by the authorities just cited; but a more convenient grouping of the cases will, we think, be obtained by considering the rights of the tenant, as they are affected: 1. By conditions existing up to and at the time the premises are hired; and 2. By circumstances arising after the execution of the contract. Speaking broadly, it is obvious that the first of these divisions is coextensive with one which would comprehend cases of fraud and mistake only, and that the second is virtually identical with one which would cover the ground of failure of consideration.

2. *No Implied Warranty That Leased Premises Are Suitable.*—A principle which we find constantly reiterated by the courts, where a lessee is seeking to be discharged from his obligations on account of some defect existing in the demised premises at the time he hired them, and which, in most instances, absolutely precludes him from obtaining relief on the ground of mistake, is that the lessee of real property runs the risk of its condition, unless he has an express agreement from the landlord in relation to the subject. In other words, a rule in the nature of *caveat emptor* applies with as much rigor to contracts of this description as to sales of chattels. As was remarked by Baron Parke in *Sutton v. Temple*, 12 Mees. & W. 52, the only condition annexed by the law to the word "demise" is that the party demising has a good title to the premises, and that the lessee shall not be evicted during the term. To the same effect see the following cases: *Hart v. Windsor*, 12 Mees. & W. 68; *Dutton v. Gerrish*, 9 Cush. 89; 55 Am. Dec. 45; *Foster v. Peyser*, 9 Cush. 242; 57 Am. Dec. 43; *Willes v. Castles*, 3 Gray, 323; *Scott v. Simons*, 54 N. H. 426; *Cleves v. Willoughby*, 7 Hill, 83; *Royce v. Guggenheim*, 106 Mass. 202; 8 Am. Rep. 322; *Elliott v. Aiken*, 45 N. H. 36; *Franklin v. Brown*, 118 N. Y. 110; 16 Am. St. Rep. 744; *Edwards v. New York &c. R. R. Co.*, 98 N. Y. 245; 50 Am. Rep. 659; *Carson v. Godley*, 26 Pa. St. 117; 67 Am. Dec. 404; *Arden v. Pullen*, 10 Mees. & W. 321; *Wilson v. Finch Hatton*, L. R. 2 Ex. D. 336; *Daly v. Wise*, 132 N. Y. 306; *Davidson v. Fischer*, 11 Col. 583; 7 Am. St. Rep. 267; *Mullen v. Ratnear*, 45 N. J. L. 520; *Doupe v. Genin*, 45 N. Y. 119; 6 Am. Rep. 47; *Bowe v. Hunking*, 135 Mass. 380; 46 Am. Rep. 471; *Libbey v. Tolford*, 48 Me. 316; 77 Am. Dec. 229; *Jaffe v. Hartean*, 56 N. Y. 398; 15 Am. Rep. 438; *Fisher v. Lighthall*, 4 Mackey, 82; 54 Am. Rep. 258; *Doyle v. Union Pac. R. R. Co.*, 147 U. S. 413; *Hazlett v.*

Powell, 30 Pa. St. 298; *Harlan v. Lehigh Coal and Iron Co.*, 35 Pa. St. 292; *Edwards v. McLean*, 122 N. Y. 302; *Huber v. Baum*, 152 Pa. St. 626. The only decisions on the other side are the early English *visi prius* cases: *Edwards v. Hetherington*, 7 Dowl. & R. 117; *Collins v. Barrow*, 1 Moody & R. 112; *Salisbury v. Marshal*, 4 Car. & P. 65, and the reasoning of some of the judges in *Smith v. Marrable*, 11 Mees. & W. 5. But the latter case was declared in *Hart v. Windsor*, 12 Mees. & W. 65, not to be sustainable on this ground, and was, together with the three preceding ones, overruled to this extent. As will be seen below (sec. 4), the decision is still regarded as correct in England, under the particular state of facts presented, but the more general doctrine which it countenances is now universally rejected.

3. *Duty of Intending Lessee to Inspect Premises.*—From the principle established by the authorities above cited, it necessarily follows that the tenant cannot abandon the premises because of the existence of defects which were discoverable by a reasonably careful examination. Thus, in the leading case of *Hart v. Windsor*, 12 Mees. & W. 68, the defendant hired a house for three years at a quarterly rent, and, on the day after he took possession, quitted the premises, which were found to be, in the words of his plea, "overrun with noxious, stinking, and nasty insects, called bugs." This claim, to be exonerated from his contract on this ground, was unanimously rejected by the court. This ruling was followed in *Foster v. Peyser*, 9 Cush. 242, 57 Am. Dec. 43, in a case where the condition of the drains made the house so unhealthy that the lessee abandoned it. These facts were held not to discharge him from the payment of the rent afterwards accruing. The same circumstances were held to be no ground for throwing up the contract in *Westlake v. De Graw*, 25 Wend. 669. Nor is it any defense to an action for rent that the demised premises had previously been occupied as a brothel, which fact was not disclosed to the tenant, and that he was, in consequence of this prior use of the house, insulted and annoyed by lewd persons calling at all hours of the night, so that he was obliged to remove: *Weeks v. Brawerman*, 1 Daly, 100. It is, perhaps, questionable whether the concealment of such a very material fact, relating not to the condition of the premises at the time the lease is executed, but to its past history, ought not to be referred to the head of fraud. Not only is the existence of a drawback of this sort not fairly open to inspection, but there is, generally speaking, at least, nothing to put a tenant on inquiry in regard to it. This case seems to come under the head of the concealment of a latent defect, respecting which the parties have not equal means of knowledge. Such a concealment, in a sale of chattels, at all events, is evidence, though not conclusive, of fraud: *Hadley v. Clinton County Importing Co.*, 13 Ohio St. 502, 82 Am. Dec. 454; and there are not wanting authorities where a similar qualification of the general rule seems to be recognized in regard to dealings between landlord and tenant. Thus in *Leonard v. Armstrong*, 73 Mich. 577, the tenant made a careful inspection of the premises, and found them apparently in good order. After he went into possession the plumbing proved to be so bad as to allow the escape of sewer gas in large quantities, and the walls cracked to such an extent that it was impossible, in cold weather, to keep up a comfortable temperature in the rooms. Under these circumstances he was held justified in abandoning the house. Compare, also, *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117, where a house was let with a damp, unhealthy cellar, which was entirely concealed by the basement floor, and which was not known to form a part of the premises, not being mentioned in the lease, and not being discovered during the tenant's examination of the house. The tenant, upon

finding the real state of the case, called upon the landlord to drain the cellar properly, and when he neglected for an unreasonable time to comply with this demand abandoned the house. He was held to be discharged from the payment of the rent thereafter accruing.

4. *Exception in the Case of Furnished Houses Hired for a Short Period.*—In *Smith v. Marrable*, 11 Mees. & W. 5, the fact that a furnished house leased for a few weeks at a watering-place was infested with bugs was held to be a sufficient reason for quitting it without notice, and to debar the landlord from recovering rent thereafter accruing. Parke, B., in his opinion used some expressions which, if they had been accepted as a correct exposition of the law, would have swept away the whole doctrine of the absence of an implied covenant of fitness in premises of all descriptions. This threatened inroad upon principles supposed to be established firmly in English jurisprudence was checked by two decisions rendered by the same court in the same year: *Sutton v. Temple*, 12 Mees. & W. 52; *Hart v. Windsor*, 12 Mees. & W. 68. In the latter case, particularly, Baron Parke took special pains to limit the effect of the ruling in *Smith v. Marrable*, and declared it could not be supported on the ground on which he rested his own judgment, but was to be justified solely by the reason assigned by Lord Abinger, viz., that “it was the case of a demise of a ready furnished house for a temporary residence at a watering-place.” To this extent *Smith v. Marrable* is still law in England: *Wilson v. Finch Hatton*, L. R., 2 Ex. D. 336. There the defendant hired a furnished house for the fashionable season in London, and having discovered, after moving in a part of her establishment, that the sanitary condition of the premises was defective, notified the landlord that she would not occupy them. The plaintiff effected some repairs, and in about two weeks tendered the house in a wholesome state to the defendant, who still declined to take possession or to pay rent. Under these circumstances it was held that the lessor could not recover any rent. Both Kelly, C. B., and Pollock, B., put their decisions upon the ground that the lessor is well aware that the lessee in such cases expects to get the premises in a fit condition for occupation on the very day that the term begins, and that if they are not made tenantable till some later day he is offered “something substantially different from that which was contracted to be given.” These two cases have been much criticized. *Smith v. Marrable*, 11 Mees. & W. 5, received a very qualified approval from Chief Justice Shaw in *Dutton v. Gerrish*, 9 Cush. 89; 55 Am. Dec. 45. In New York, although the point has not been directly decided, it would seem from the remarks of the court in *Franklin v. Brown*, 118 N. Y. 110, 16 Am. St. Rep. 744, that the English doctrine has not taken root, and in New Jersey it has been explicitly repudiated: *Murray v. Albertson*, 50 N. J. L. 167; 7 Am. St. Rep. 787. There, after giving a summary of the English authorities, Mr. Justice Depue pronounced the opinion of the court to be that “the principles of the common law which do not warrant the implication of a contract for the fitness of the land or tenement demised from the act of letting” were applicable to the letting of a furnished house as well as to that of other kinds of real property. In *Robertson v. Amazon Tug Co.*, L. R., 7 Q. B. D. 598, 604; also, Lord Justice Bramwell, while not denying the correctness of the ruling in *Wilson v. Finch Hatton*, L. R., 2 Ex. D. 336, pointed out with regard to the principle relied upon by Chief Baron Kelly, that even if both parties had “contemplated” what was imputed to them, it did not follow that they so “agreed.” This seems to be a fatal objection to resting the decision on a proposition of so wide a sweep as that laid down by the learned chief baron and his associates. As was pertinently remarked

in *Murray v. Alberton*, 50 N. J. L. 167; 7 Am. St. Rep. 787, such reasoning as this would raise an implied contract of the same character in every letting where the parties acted in good faith. But it is submitted that a sufficient foundation for the English doctrine may be obtained by adverting to the theory on which the rule of *caveat emptor* is applied to a contract of this description, viz., that the lessee is presumed to have a full opportunity of protecting his own interests by examining the subject matter of the contract, and if he fails to exercise due diligence in that respect, he has no standing in a court of law to procure relief from any disagreeable consequences that may follow. In some instances the hirer of a furnished house has an opportunity of making such an examination, and Lord Abinger more than intimates that the rights of the parties ought then to stand on the same footing as if the house were unfurnished: *Sutton v. Temple*, 12 Mees. & W. 52. But, generally speaking, there is no such opportunity. As was well observed by Mr. Justice Knowlton in *Ingalls v. Hobbs*, 156 Mass. 348, 32 Am. St. Rep. 460, where the English rule was adopted, "it is very difficult and often impossible for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine *caveat emptor*, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time." This simple application of the maxim, *Cessante ratione legis, cessat ipse lex*, appears to furnish a perfectly satisfactory answer to the objections which have been leveled against the English doctrine. If further support for that doctrine be required, it may be found in the analogous exception to the rule of *caveat emptor* which the law raises in regard to the sale of household provisions for immediate use a contract which, *mutatis mutandis*, is very similar to that which we are discussing.

It may be mentioned here, though the circumstances belong more properly to a subsequent portion of this note, that the implied warranty that a furnished house shall be fit for human habitation only covers the condition of the premises at the commencement of the tenancy, and that the tenant cannot quit because during the term the plastering of the ceiling falls or becomes unsound and liable to fall: *MacLean v. Currie*, 1 Cababe & E. 361 (per Stephen, J.).

5. *Fraud on the Part of the Lessor*.—In some cases an attempt has been made to evade the application of the rigid rule, that a warranty of fitness is not implied in a lease, by the argument that to let the premises in a bad condition is in itself a deceit which entitles the tenant to relief. This was one of the defenses put forward in *Hart v. Windsor*, 12 Mees. & W. 68, but it does not seem to have been insisted upon, and was not discussed by the court. The point was, however, taken directly in *Keates v. Earl of Cadogan*, 10 Com. B. 591, where it was held that to enable a tenant who has gone into possession of ruinous and unsafe premises to recover damages against his landlord in an action for deceit there must be an express warranty or active deceit on the part of such landlord, and that a mere omission to inform the proposed tenant of the condition of the demised premises is not enough. Compare, also, *Dutton v. Gerrish*, 9 Cush. 89; 55 Am. Dec. 45. The principle of these decisions was recognized as being applicable to the abandonment of the premises by the tenant in the recent case of *Daly v. Wier*, 132 N. Y. 306, where the rule was stated in the following expanded form: Where the lessor knowing at the time of the execution of the lease of the existence of secret

defects or conditions rendering the building unfit for a residence, fraudulently represents to the lessee that they do not exist, or fraudulently conceals their existence, if the lessee abandons the house, because thereof, he will not be liable for rent subsequently accruing. In that case a tenant, occupying under a lease which contained no covenant on the part of the lessor that the premises were or would be put in good condition, or would be kept so, abandoned the premises because of their unsanitary condition. In an action to recover rent thereafter accruing, the defendant testified that the plaintiffs' agent represented that the plumbing was all in good condition; that it had been fixed as they thought it ought to be; but it was not shown that the plaintiff or his agent knew this statement to be false, or that it was made without actual or supposed knowledge, or that it was made in bad faith, or that the plumbing had not been fixed as stated. These circumstances were held not to establish a fraudulent concealment on the lessor's part. With this case may be contrasted *Maywood v. Logan*, 78 Mich. 135; 18 Am. St. Rep. 431, where the water in a well on the demised premises, about the quality of which the tenant had made special inquiries, was so polluted by decaying animal substances as to render its use unhealthful, and this fact was known to the landlord, and fraudulently concealed from the tenant. Upon this showing it was held that the tenant would have been justified in abandoning the premises, and, having elected to remain, he was allowed to recoup against the rent the damages caused by the unsanitary condition of the well. It should be noticed that a tenant who abandons under such circumstances cannot sue for a breach of the contract and establish his case by evidence that the lessor represented to him, when he leased the house, that it was in good sanitary condition. Such evidence is incompetent, as tending to vary and enlarge the written contract: *Stevens v. Pierce*, 151 Mass. 207.

6. *Effect of Express Stipulations.*—If the landlord limits the use of the building to a certain purpose specified in the lease, this is construed as a warranty that it shall be made suitable for that purpose, and if it is not made so, the lessee may quit: *Young v. Collett*, 63 Mich. 331, where a room was let for use as an Odd Fellows' lodge. It was held that the lessor must be charged with the knowledge that a room is not adapted for the secret work of such societies unless the floor is "deadened" in a special manner. So, too, if there is a distinct understanding that the demised house is in good condition, a tenant will be justified in abandoning it on account of defects in the sewage, which he did not discover at first, and afterwards endeavored without success to remedy: *Tyler v. Disbrow*, 40 Mich. 415. But to what extent the tenant is relieved, by the fact that his rights are defined by a special agreement, of the duty of making a reasonably careful inspection of what he is getting, will obviously depend on the tenor of such agreement. Thus in *Edwards v. McLean*, 122 N. Y. 302, it was stipulated that the house was to be furnished, "as it now is, but more particularly as described in a certain inventory, which is to accompany and form part of this lease." The lessee saw the house and furniture, but did not ask for the inventory. The previous tenant, upon quitting, took away articles of furniture belonging to himself. This was denied to be a ground for avoiding the lease. Whether the tenant is justified in abandoning, at the particular time he did, premises which the lessor has failed to put in good condition, according to his agreement, is a question for the jury: *Young v. Burhans*, 80 Wis. 438.

7. *Failure of the Lessor to Put Lessee in Possession of Demised Premises.*—The consideration of a lease may fail through the inability or refusal of the lessor

to place the lessee in possession of the demised premises, and this is recognized as a ground for permitting the tenant to abandon: *Camarillo v. Fenlon*, 49 Cal. 207; *Skaggs v. Emerson*, 50 Cal. 6; *Dengler v. Michelsen*, 76 Cal. 125. Similarly, where the entry of the tenant is under an agreement by the owner to execute a valid lease for a term for which a writing is required, and he afterwards, in bad faith, refuses to execute it, repudiates the relation of landlord and tenant, and within the year resumes dominion over the property, the tenant may abandon: *Gretton v. Smith*, 33 N. Y. 245. Circumstances analogous to partial eviction, after occupation of the premises has begun (see sec. 19, *infra*), may also arise before the tenant has gone into possession, and justify an abandonment; as where a lessor wrongfully removed a cistern, part of the demised premises, between the execution of the lease and the day for taking possession: *Cleves v. Willoughby*, 7 Hill, 83.

8. *Circumstances Arising After the Commencement of the Tenancy, Generally.* The cases in which it has been sought to establish the right to repudiate leases for reasons accruing after the lessees have gone into possession group themselves under two general heads, viz., those in which conditions arising from some extrinsic cause for which the landlord is not personally answerable are relied upon as a ground for abandonment, and those in which he is charged with a breach of duty in depriving the tenant of the beneficial enjoyment of the premises by an actual or a constructive eviction.

9. *Restoration of Destroyed or Injured Building, Landlord's Duty as to—*
(a) *Under Common Law.*—Since the decision in the old English case of *Paradine v. Jane*, *Alleyn*, 27, it has been uniformly held that unless the tenant protects himself by a stipulation in the lease, or the landlord covenants to rebuild, the destruction of the demised premises will not excuse the tenant from the performance of an express covenant to pay rent: See note to *McMillan v. Solomon*, 94 Am. Dec. 662; and that, in the absence of an agreement to repair, he is not bound to keep the premises in repair: See note to *Polack v. Pioche*, 95 Am. Dec. 118.

(b) *Under Statutes.*—The rigor of these common-law rules has been to some extent mitigated by statutes of which that of New York may be taken as a type. It is there enacted that the lessees of buildings which shall, "without any fault or neglect on their part, be destroyed, or be so injured by the elements or any other cause as to be untenable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof after such destruction or injury, unless otherwise expressly provided by written agreement or covenant; and the lessees or occupants may thereupon quit and surrender possession of the leasehold premises and the land so leased." Under these enactments the courts have held that the legislature did not intend the tenant to be relieved of his duty to make repairs, where the injury is caused by ordinary decay: *Snydam v. Jackson*, 54 N. Y. 450; that the failure of the landlord to repair entitles the tenant either to quit the premises or to repair at the landlord's expense: *Johnson v. Oppenheim*, 55 N. Y. 380; that a tenant need not notify his landlord of his intention to surrender, and is merely required to surrender as soon as possible: *Fleischman v. Topfritz*, 134 N. Y. 349; that no right is conferred upon the tenant to throw up his lease merely because the owner of an adjoining lot erects a building which cuts off light and air from the demised premises: *Hilliard v. Gas Coal Co.*, 41 Ohio St. 662; 52 Am. Rep. 99. In other states, as California, the benefit of the statute is confined to tenants of a building intended for human occupancy, and is not applicable to business property: *Willson v. Treadwell*, 81 Cal. 58. The result of the landlord's breach of duty to put

such a building in proper condition is that the tenant may vacate the premises: *Sieber v. Blanc*, 76 Cal. 173; *Tatum v. Thompson*, 86 Cal. 203. But if the tenant, before entry, had it in his power to inspect the premises, he cannot escape the effect of his contract by abandoning them as being unfit for occupation, without notice to the landlord to repair them: *Green v. Redding*, 92 Cal. 548. Under the Connecticut statute, by which the rent is suspended so long as the premises are untenable, they must be made fit for occupancy in a reasonable time, or the tenant may abandon them completely: *Miller v. Benton*, 55 Conn. 529.

(c) *Under Stipulations in the Lease.*—The relationship of the contracting parties is often fixed by stipulations in the lease calculated to secure the tenant in somewhat the same manner as the statutes. Under a lease providing that if the premises should be damaged by fire the rent should be suspended as long as they were unfit for occupancy, it has been held that the lease is not terminated if the circumstances contemplated should arise: *Smith v. McLean*, 123 Ill. 210. There the repairs were executed in a reasonable time, and the court intimated that this would be necessary, in such a case, to perfect the rights of the landlord to the rent, a rule which commends itself to common sense, and is strongly sustained by the decision in *Miller v. Benton*, 55 Conn. 529, referred to in the next preceding paragraph. Where the lease provides that the relation of landlord and tenant is to terminate "if the premises are destroyed by fire," that consequence will not follow from a partial injury to the premises: *Wall v. Hinds*, 4 Gray, 256; 64 Am. Rep. 64; nor where a lease provides that the rent is to cease in case the premises become untenable by fire, will an injury by fire to furnishings and damage by smoke and water, rendering occupancy unpleasant, exempt the lessees from obligation to pay rent: *Lewis v. Hughes*, 12 Col. 208.

(d) *Where Only Part of Building Is Leased.*—Upon the ground that the noncessation of the rent, after the destruction of a demised building, depends upon the doctrine, that the rent issues out of the land, and that the tenant is therefore not deprived by the catastrophe of what he bargained for, some courts have ingrafted upon the general rule an exception, to the effect that a tenancy of a part of a building is dissolved, when the building is destroyed. In this case it is said that as the ground is not leased, there is nothing to which the lease can attach after the building ceases to exist: *McMillan v. Solomon*, 42 Ala. 356; 94 Am. Dec. 654; *Chamberlain v. Godfrey*, 50 Ala. 530; *Kerr v. Merchants' Exchange*, 3 Edw. Ch. 315; *Winton v. Cornish*, 5 Ohio, 477; *Beham v. Ghio*, 75 Tex. 87; *Hilliard v. Gas Coal Co.*, 41 Ohio St. 662; 52 Am. Rep. 99; *Graves v. Berdan*, 26 N. Y. 498; *Stockwell v. Hunter*, 11 Metc. 448; 45 Am. Dec. 220; *Smith v. McLean*, 123 Ill. 210. In *Izon v. Gorton*, 5 Bing. N. C. 501, the tenants occupied the second floor of the building, which, during their occupation, was consumed by an accidental fire. The landlord rebuilt, but the tenant refused to occupy. Under these circumstances, it was held that he must pay rent up to the time when the premises were let to a third party. The counsel for the defendant compared the case to that of a lodging, where, after a fire, there is nothing to occupy; but the court declined to accept this reasoning, and thought it enough that "the space inclosed by the four walls, still continued as marked out by them." Chief Justice Tindal, however, laid stress upon the fact that, as no notice to quit had been given on either side, there was nothing to prevent the tenant from re-entering, and, if so, the obligation of each of the parties must be reciprocal. So far as the case goes it seems to place the English courts in antagonism with those of this country. But it is not quite apparent whether

the ruling would have been different if adequate notice of abandonment had been given, and the tenant had thereby precluded himself from complaining that the premises were let to another party.

10. Acts of Third Parties, When Justify Abandonment.—It is well settled that the lessee may surrender the premises to one who is actually adjudged to be the owner of the paramount title, and claim an eviction: *Home Life Ins. Co. v. Sherman*, 46 N. Y. 370; as where the mortgagor, after a foreclosure sale, gives up possession to the purchaser: *Simers v. Saltus*, 3 Denio, 214. So, too, a lessee may treat as an eviction a recovery in an action of trespass brought against him by a prior lessee: *McAlester v. Landers*, 70 Cal. 79. Nor is a tenant bound to defend against a title which he knows—must ultimately prevail: *Hamilton v. Cutts*, 4 Mass. 349; 3 Am. Dec. 222; though, if he yields possession before the title of the demandant is judicially determined, he does so at his peril, and assumes the burden of proving that the entry was made under a paramount title: *Marsh v. Butterworth*, 4 Mich. 575; *Greenvault v. Davis*, 4 Hill, 643. Thus the tenant may treat as an eviction a threat by a mortgagee, after entry for condition broken, to expel him, if he will not enter into a new contract: *Smith v. Shepard*, 15 Pick. 147; 25 Am. Dec. 432. Similarly, where the mortgagee of the lessor, the interest on the mortgage having fallen into arrear, notified the lessee to pay rent to him, and the lease turned out to have been made without the assent of the mortgagee, contrary to the express stipulations of the mortgage, it was held that the lessee was justified in abandoning, although, under the circumstances, payment of the rent to the mortgagee would probably have been a good defense to an action therefor by the lessor: *Carpenter v. Parker*, 3 Com. B., N. S., 206.

If the eviction by a stranger is partial it merely authorizes an apportionment of the rent, and does not raise a right to abandon, as in the case of a similar eviction by the lessor: *Halligan v. Wade*, 21 Ill. 470; 74 Am. Dec. 108. This principle has been frequently applied in cases where a portion of the leased property has been taken by proceedings in eminent domain: See a full list of the authorities in *Stubbings v. Evanston*, 136 Ill. 37; 29 Am. St. Rep. 300.

Acts interfering with the tenantable condition of the premises, which, if done by the lessor with the intention to evict the lessee, would justify an abandonment, will not have that result if done by a stranger. Thus there is no eviction where an adjoining owner builds so as to cut off light and air from the demised premises: *Hazlett v. Powell*, 30 Pa. St. 293; *Hilliard v. Gas Coal Co.*, 41 Ohio St. 662; 52 Am. Rep. 99; nor where the premises are injured by the settling of a partition wall, owing to excavations made by a neighbor, although the lessor has been notified of the operations: *Kramer v. Cook*, 7 Gray, 550. In all such cases the remedy, if any, of the lessee must be sought against the party doing the injury: *Kimball v. Grand Lodge of Masons*, 131 Mass. 59.

11. Circumstances for Which Lessor Is Not Responsible, No Ground for Abandoning Premises.—In *Edwards v. McLean*, 122 N. Y. 302, the general principle that, in the absence of an express covenant by the lessor that the premises shall continue fit for occupation, the lessee cannot repudiate his contract because they become untenable, was applied to a case where, after the execution of a lease of a dwelling-house for a term to commence in the future, a person residing therein was taken sick with an infectious disease, and consequently it would not have been safe or prudent to take young children into the house at the beginning of the term. It was held that this

did not avoid the contract, as it was merely an instance of the accidental depreciation of the rental value of the premises, from a cause beyond the landlord's control, after the interest of the tenant had already vested. The tenant would have reaped the benefit of any occurrence which would have increased that value, and must therefore be compelled to sustain any loss which might accrue from a circumstance of this character.

19. Abandonment by Reason of the Lessor's Acts—What Constitutes Eviction.—That a necessary element of eviction is a motion from the demised premises is a principle which is not disputed. Until the case of *Dyett v. Pendleton*, 8 Cow. 727, was decided, in 1826, it was an open question in New York whether that motion must be by the forcible removal of the tenant by the landlord from the demised premises or a portion thereof. The supreme court decided that actual expulsion was necessary, but the court of errors ruled that, when the lessor is guilty of acts that preclude the tenant from a beneficial enjoyment of the premises, in consequence of which the tenant abandons the possession before the rent becomes due, the lessor's action for the recovery of rent is barred, although he has not forcibly turned the tenant out of possession. In other words, the necessary motion may be either by physical expulsion or by abandonment by the tenant upon some act of the landlord which amounts to an eviction at the election of the lessee: *Skally v. State*, 132 Mass. 367. Such an act, accompanied by an abandonment of possession by the lessee, is deemed a virtual expulsion of the tenant, and, equally with an actual expulsion, bars the recovery of rent: *Edgerton v. Page*, 20 N. Y. 281; *Boreel v. Lawton*, 90 N. Y. 293; 43 Am. Rep. 170; *Upton v. Townsend*, 17 Com. B. 30, 74 (per Willes, J.); *Ogilvie v. Hull*, 5 Hill, 52; *McChurg v. Price*, 59 Pa. St. 420; 98 Am. Dec. 356; *Royce v. Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322, and the cases cited below.

In *Upton v. Townsend*, 17 Com. B. 30, the whole subject of eviction underwent an elaborate discussion, and each of the four judges gave his views as to the meaning of the term. Chief Justice Jervis said: "It is extremely difficult at the present day to define with technical accuracy what is an eviction. Latterly the word has been used to denote that which formerly it was not intended to express. In the language of pleading, the party evicted was said to be expelled, removed, and put out. The word 'eviction'—from *evincere*, to evict, to dispossess by a judicial course—was formerly used to denote an expulsion by the assertion of a title paramount, and by process of law. But that sort of eviction is not necessary to constitute a suspension of the rent, because it is now well settled, that, if the tenant loses the benefit of the enjoyment of any portion of the demised premises, by the act of the landlord, the rent is thereby suspended. The term eviction is now popularly applied to every class of expulsion or motion. Getting rid of the old notion of eviction, I think it may be taken to mean this—not a mere trespass, and nothing more, but something of a graver and permanent character done by the landlord, with the intention of depriving the tenant of the enjoyment of the demised premises." Williams, J. thought that any act of interference by the landlord with the tenant's enjoyment of the premises, which amounted to a clear indication of intention on the part of the former that the tenant should no longer continue to hold such premises, would constitute an eviction. Crowder, J. considered the test to be that the act of the landlord should have substantially and permanently deprived the tenant of the subject matter of the demise. Willes, J. was of opinion that an act amounts to an eviction, "where it is one of a permanent character, which is done by the landlord in order to deprive, and which has the effect of de-

priving, the tenant of the use of the thing demised, or of a part of it." This case has been extensively cited and approved in this country: *Royce v. Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322; *Skally v. Shute*, 132 Mass. 367; *Rice v. Dudley*, 65 Ala. 68; *Hayner v. Smith*, 63 Ill. 430; 14 Am. Rep. 124, and the remarks of the judges form the basis of the following very clear and comprehensive definition of eviction given by Morton, J., in *Bartlett v. Farrington*, 120 Mass. 284: "To constitute an eviction which will operate as a suspension of rent, there must be either an actual expulsion of the tenant, or some act of a permanent character, done by the landlord with the intention and effect of depriving the tenant of the enjoyment of the demised premises or some part of it, to which he yields, abandoning the possession within a reasonable time." Compare, also, *Warren v. Wagner*, 75 Ala. 188; 51 Am. Rep. 446.

13. *Intention to Remove Tenant, a Material Element of Eviction.*—In all the definitions of eviction given in the preceding section the principle is recognized that there can be no eviction without an intention on the landlord's part to deprive the tenant of the beneficial enjoyment of the demised premises. The presence or absence of this intention serves to determine whether the act is a mere trespass or an eviction: *Upton v. Townend*, 17 Com. B. 30, 68; *Henderson v. Mears*, 28 L. J. Q. B. 305; *Royce v. Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322; *Skally v. Shute*, 132 Mass. 367. But such intention may be presumed from the character of the act, if the necessary result of it is to deprive the tenant of the beneficial enjoyment of the premises: *Skally v. Shute*, 132 Mass. 367; *Sherman v. Williams*, 113 Mass. 481; 18 Am. Rep. 522.

14. *Intent, Question of Whether for Court or Jury.*—In *Skally v. Shute*, 132 Mass. 367, the court made the following remarks: "Generally the question, whether acts of the landlord, in consequence of which the tenant abandons the premises, amount to an eviction is a question of law, and includes the question whether they constitute proof of the intent. A person is presumed to intend the natural and probable consequences of his acts; and when the acts of the landlord upon the demised premises are such as naturally and probably exclude the tenant from possession and enjoyment of the premises, and assert a title in the landlord himself, the law presumes an intent to do so; and, if the natural consequence follows, the acts are said to amount to an eviction. From the physical exclusion of the tenant from the premises the law presumes an intent to evict; and wrongful acts of the landlord upon the premises, which render them permanently unsafe and unfit for occupancy, so that the tenant loses the enjoyment of them, carry with them the presumption of the intent to deprive the tenant of that enjoyment." If, however, the character of the landlord's acts is ambiguous, and an intent to evict not a necessary presumption therefrom, the question whether those acts do or do not amount to an eviction is to be left to the jury: *Lynch v. Baldwin*, 69 Ill. 210; *Hayner v. Smith*, 63 Ill. 430; 14 Am. Rep. 124; *Rice v. Dudley*, 65 Ala. 68; *Upton v. Townend*, 17 Com. B. 30; *Henderson v. Mears*, 28 L. J. Q. B. 305; *Bennett v. Bittle*, 4 Rawle, 339; *Dyett v. Pendleton*, 8 Cow. 727; *Hunt v. Cope*, 1 Cowp. 242; *Tallman v. Murphy*, 120 N. Y. 345.

15. *Intention to Move Tenant Inferred From Lessor's Acts of Ownership in Regard to Leased Premises.*—The circumstances most nearly akin to that actual physical expulsion which, as we have seen, was formerly held by some courts to be a necessary element of eviction, are presented by those cases in which there is a direct interference with the premises, which impairs the

tenants rights of occupation. The rule is undisputed, that a mere tortious entry by the landlord upon the demised premises does not constitute an eviction, unless it is accompanied by conduct amounting to a claim of ownership: *Bushnell v. Lechmore*, 1 Ld. Raym. 370; *Bennett v. Bittle*, 4 Rawle, 339; *Fuller v. Ruby*, 10 Gray, 285; *Wilson v. Smith*, 5 Yerg. 379; *Skelly v. Shute*, 132 Mass. 367; *Avery v. Dougherty*, 102 Ind. 443; 52 Am. Rep. 680; *Warren v. Wagner*, 75 Ala. 188; 51 Am. Rep. 446; Wood's Landlord and Tenant, 574. The lessor's conduct sometimes speaks for itself and shows conclusively that that he had no intention of permanently depriving the tenant of the enjoyment of the subject matter of the lease. Thus a wrongful interference with the personal property on the demised premises cannot, without more, amount to an eviction. Here there is no failure of consideration, for the thing demised is neither wholly nor partially taken from the tenant. Thus in *Bartlett v. Furrington*, 120 Mass. 284, it was held that no eviction was established by evidence showing that "the plaintiff from time to time entered upon the premises and gathered the flowers and the annual crops, cut down a partially decayed apple tree, and, on the day when the defendant vacated the house, removed a cooking-stove from the kitchen." A similar decision was made in *Kimball v. Grand Lodge of Masons*, 131 Mass. 59, in regard to the removal of furniture, the court referring to the earlier case. Nor is it an eviction for the lessor to continue, against the lessee's wish, to exercise a temporary privilege granted by the latter of piling cordwood on the demised lot: *Lounsbery v. Snyder*, 31 N. Y. 514. Acts of this kind are mere trespasses for which the tenant has an action at law, but they do not excuse him from the payment of rent.

It has also been held that there was no eviction where the lessor filled up a cellar in the demised house, contrary to his agreement, and deprived the lessee of its use: *McFadin v. Rippey*, 8 Mo. 738; nor where the lessor "separated, pulled down, and carried away a penthouse fixed and annexed to the premises demised": *Roper v. Lloyd*, T. Jones, 148. But these two cases seem to belong more properly to the class in which the circumstances may or may not amount to an eviction according to the lessor's intention. The theory that a court is entitled to pronounce, as a matter of law, that such acts are a mere trespass cannot, we think, be reconciled with the general current of authority: See especially the oft-cited case *Hunt v. Cope*, 1 Cowp. 242; 1 Williams' Saunders, 204, note, the facts of which are summarized in section 15, *infra*.

No intention to evict can be inferred from a mere formal entry by the lessor, to repossess the premises, as a step precedent to an action of ejectment, where the tenant's occupation is not interrupted, and ultimately he wins the suit: *International Trust Co. v. Schumann*, 158 Mass. 287; nor from the commission of acts calculated to prevent persons from applying to the tenant for under leases, e. g., offering to let the premises himself, and advertising for that purpose: *Ogilvie v. Hull*, 5 Hill, 52.

Sometimes the lessor's acts of interference, although permanently depriving the tenant of the power to use the demised premises in the manner contemplated by the contract are not tortious at all, and, in such cases, it is clear that no eviction is committed; as where a landlord refused to allow his tenant to keep cartridges in a building demised for use as a powder magazine, an act of parliament having come into force during the tenant's occupation of the premises, whereby the storage of cartridges in such a building was prohibited: *Newby v. Sharpe*, L. R. 8 Ch. Div. 39. Still more clearly is the landlord not guilty of an eviction where he objects to the use

of the premises for purposes prohibited in the lease, and removes the forbidden articles: *Hayward v. Range*, 33 Neb. 836.

On the other hand an eviction has been held to have occurred where the landlord's entry was followed by continuous possession: *Day v. Watson*, 8 Mich. 535; where the landlord locked up a barn on the premises, prevented a subtenant, to whom the lessee had transferred the term, from coming in, and put another person in possession: *Briggs v. Thompson*, 9 Pa. St. 339; where the landlord forbade an under tenant to pay rent, and collected it himself: *Leadbeater v. Roth*, 25 Ill. 587; where the landlord distrained upon the tenants of several parcels of a tract which, after the demising of such parcels, he had leased, as a whole, to another party: *Lewis v. Payn*, 4 Wend. 423; where the landlord let the premises after an unlawful abandonment by the tenant: *Hall v. Burgess*, 5 Barn. & C. 832; where the landlord took possession of the premises without the tenant's consent for the purpose of rebuilding after a fire: *Magaw v. Lambert*, 3 Pa. St. 444; *Heller v. Royal Ins. Co.*, 151 Pa. St. 101; *Cook v. Anderson*, 85 Ala. 99; where the landlord undertook to prevent the tenant from subletting premises for a purpose not expressly prohibited by the lease: *Crommelin v. Thiess*, 31 Ala. 412; 70 Am. Dec. 499.

16. *Intention to Remove Tenant Inferred From Acts Materially Changing the Premises.*—The leading case on this point is *Upton v. Townend*, 17 Com. B. 30, already referred to. There separate buildings rented by tenants from the same lessor were destroyed by fire, and rebuilt. The new buildings varied from the old ones, inasmuch as the area occupied by one was decreased by the reconstruction, and the area of the other was increased. It was held that this alteration was an eviction in both cases, the ground taken being that the landlord had no right to impose on the tenant a thing different from that which he undertook to let to him, and there was in the one case as much a deprivation of the thing demised as the other. Two earlier cases were cited by the court, in which similar circumstances were involved: *Smith v. Raleigh*, 3 Camp. 513, and *Hunt v. Cope*, 1 Cowp. 242. In the former the landlord's act in railing off a portion of a garden which had been demised with a house at one entire rent, and erecting a building thereon for the accommodation of his other tenants, was held to be an eviction. In the latter it was held that where a tenant sought to exonerate himself from the payment of rent, on the ground that the lessor entered upon his garden, and pulled down a summer-house, he should have pleaded an eviction, not a trespass; and that it would have been for the jury to decide whether the facts stated amounted to one: Compare, also, *Wright v. Latten*, 38 Ill. 293, summarized in the following section:

17. *Intention to Remove Tenant Inferred From Lessor's Acts Affecting Tenantable Qualities of Leased Premises.*—It has been seen above that the landlord is not, in the absence of an express stipulation, or some statutory provision, bound to see that the demised premises are suitable for the purpose for which they are hired, nor to make repairs. But, on the other hand, he cannot, by any positive act or neglect of duty, substantially defeat the tenant's enjoyment of the premises, and at the same time hold him to his contract. As was said in *Tallman v. Murphy*, 120 N. Y. 345, "a failure to perform a duty which the landlord owes to the tenant, and without the due performance of which the leasehold premises are not tenantable, would constitute an eviction." Thus there has been held to have been an eviction where the lessor suffered the ceiling over a store to become so defective that the tenant was annoyed and injured by the dripping of tar and other substances

upon his property from the room above: *Jackson v. Eddy*, 12 Mo. 209; where the lessor obstructed the access of customers to the lessee's store: *Edmison v. Lowry*, South Dak. Sup. Ct., June, 1892; where the lessor deprived a boat club of access to the water front: *Pridgeon v. Excelsior Boat Club*, 66 Mich. 326; where, after leasing land to an agricultural society, the lessor entered and tore down portions of the fences erected by the lessee, and injured its buildings, besides herding cattle and hogs on the grounds, and thereby rendering them unfit for the lessee's use: *Wright v. Lattin*, 38 Ill. 293; where, after demising part of a building for a hotel, the lessor allowed a low, noisy liquor saloon to be set up in the reserved part of the premises: *Halligan v. Wade*, 21 Ill. 470; 74 Am. Dec. 108. In *Boreel v. Lawton*, 90 N. Y. 293, 43 Am. Rep. 170, the tenant sought, in an action for rent, to counterclaim damages, on the ground that the lessor had permitted the rooms overhead to be occupied by persons carrying on a business so noisy as to interfere with office work. The court ruled that, assuming the defendant to have a right of action, it was not such as could be made the subject of a counterclaim; but Chief Justice Andrews intimates that the defendant, on the facts stated, might have been justified in abandoning the premises. (In *Thomas v. Nelson*, 69 N. Y. 118, Mr. Justice Earl threw out a suggestion to the effect that the lessee in that case probably would have been justified in abandoning the premises on account of a flue's being so defective as to render occupancy of the premises extremely unpleasant.) This suggestion was taken up in *Tallman v. Murphy*, 120 N. Y. 345, where the same kind of a defect was shown to exist to such an extent as to render the inmates of the house sick. Under such circumstances there was deemed to be a common law as well as a statutory right of abandonment. Two judges, however, were of opinion that the tenant could not claim relief either upon the principles of common law or under the statute. The case undoubtedly goes rather far on the side of the tenant, and may be regarded as a significant indication of the tendency of modern judges to look at these questions more and more from the point of view which has given rise to the various statutes which recognize the unfairness of the older doctrines, and mitigate their harshness in the interest of the lessee.

One of the grounds assigned in *Tallman v. Murphy*, 120 N. Y. 345, for the decision of the majority of the court was the fact that, from causes under the control of the landlord, the premises had become so unsafe, that the tenant could not reasonably be expected to continue to occupy them. The dissenting judges did not deny the soundness of the general principle here involved, but considered that the evidence did not establish any responsibility on the landlord's part. That such insecurity of the premises will, if it is actually shown to have been produced by conditions which it was the landlord's duty to guard against, constitute a lawful ground of abandonment, is a doctrine fully recognized in *Skally v. Skute*, 132 Mass. 367.

Of course if the untenable condition of the premises is allowed to arise in violation of the lessor's express stipulations, the right of the tenant to abandon is plain and undisputed: *West Side Savings Union v. Newton*, 76 N. Y. 616; *Pierce v. Joldersma*, 91 Mich. 463; *Brown v. Holyoke Water Power Co.*, 152 Mass. 463; 23 Am. St. Rep. 844. (Compare sec. 9 (c), *ante*.)

On the other hand the mere fact that the landlord builds on adjoining land, so as to darken the windows of a demised building, is not an eviction: *Myers v. Gemmel*, 10 Barb. 537; *Palmer v. Wetmore*, 2 Sand. 316; unless as is suggested in *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322, there is an actual intention, by so doing, to deprive the tenant of the beneficial

enjoyment of the premises. Nor is there any eviction where the landlord, knowing the leased premises to be of value only for the business of a licensed victualler and seller of liquors, induced the liquor commissioners to deny the lessee a prolongation of his license: *International Trust Co. v. Schamaun*, 158 Mass. 287; nor where he merely prevents a lessee of mining property from enjoying the easement of using a railway, which was granted by the lease: *Williams v. Hayward*, 1 El. & E. 1040.

18. *Existence of Nuisance on Demised Premises, When Equivalent to Eviction of Tenant.*—The effect of the general doctrine illustrated in the preceding section has been frequently discussed, where the conditions alleged to render the premises unfit for occupation amounted to an intolerable nuisance. The question whether the maintenance of such a nuisance by the landlord would operate as an eviction seems to have been first presented in the early New York case of *Pendleton v. Dyett*, 4 Cow. 581. There the tenant, after abandonment, was sued for the rent thereafter accruing, and sought to introduce, by way of defense, evidence that the plaintiff had brought into other parts of the house, adjacent to the demised premises, lewd women with whom he and other men kept company; that prostitution, noise, and riot were carried on from time to time, and obscene and vulgar language used, so that the defendant's family were greatly disturbed, and odium and infamy thereby brought upon the house, as a place of ill-fame; and that the defendant was compelled, by the repetition of these practices, to leave the premises. The supreme court decided that this evidence did not support a plea of eviction, and was, therefore properly rejected. The court of errors, however, was of a different opinion, and held that the reasons which were relied upon by Mr. Justice Sutherland were based upon a misapprehension of the law: *Dyett v. Pendleton*, 8 Cow. 727. Senator Spencer, after pointing out that the court was not called upon to say whether the facts alleged by the lessee were alone sufficient to establish a failure of consideration, and that the jury were, in the first instance at least, to judge of such sufficiency, so that the question whether they amounted to a full and complete legal defense might be presented in another shape, said that he believed that the evidence tended to establish a constructive eviction and expulsion against the consent of the tenant, and ought therefore to have been received. "Were this," he remarked, "a case in which the law was considered settled by the supreme court, that nothing but a physical turning a tenant out of possession would exonerate him from the payment of his rent, it would be precisely such as would require the interposition of this court to correct it; not by making the law, but by applying its familiar and elementary principles to a new case. Suppose the landlord had established a hospital for the smallpox, the plague, or the yellow fever, in the remaining part of this house; suppose he had made a deposit of gunpowder under the tenant, or had introduced some offensive and pestilential materials of the most dangerous nature, can there be any hesitation in saying that if, by such means, he had driven the tenant from his habitation, he would not recover for the use of that house, of which by his own wrong, he had deprived the tenant. It would need nothing but common sense and common justice to decide it. No man shall derive benefit from his own wrong. The idea that the tenant has some other remedy to remove the evil (i. e., by abating the nuisance) does not reach the case where the evil is already inflicted. Besides, it has been entirely exploded on the argument of this cause. For, in the very case where it is admitted the tenant would be exonerated from the payment of rent—where there had been an actual eviction and physical expulsion by his landlord—he has an

adequate and effectual remedy under the statute to prevent forcible entries." Several members of the court refused to accept these views, and in two later cases in the same state the decision was deemed to be an extreme one: *Etheredge v. Osborn*, 12 Wend. 529; *Ogilvie v. Hull*, 5 Hill, 52. In *Gillhooley v. Washington*, 4 N. Y. 217, the defendant sought to establish an eviction by evidence that the basement of the building had been leased to a person who had used it as a place of prostitution. The court distinguished these circumstances from those under review in *Dyett v. Pendleton*, 8 Cow. 727, on the ground that it was not shown that the landlord had any connection with the nuisance, or knew of its existence until the tenant gave him notice of the fact, which was about one month after the abandonment of the premises. A judgment in the landlord's favor was, therefore, sustained. Upon a very similar state of facts, there was held to be no eviction in *De Witt v. Pierson*, 112 Mass. 8, 17 Am. Rep. 58, the court remarking that there was an essential difference between a case like *Dyett v. Pendleton*, 8 Cow. 727, where the landlord himself creates the nuisance and those in which he has no connection with it. A later Massachusetts case, *Skally v. Shute*, 132 Mass. 367, followed the New York rule, where the nuisance was not simply a source of annoyance, but dangerous to health. So, also, in *Rowbotham v. Peuce*, 5 Houst. 135, although *Dyett v. Pendleton*, 8 Cow. 727, does not seem to have been brought to the notice of the court, the conclusion arrived at was that the disturbance of a tenant by gaming, unseemly sports, uncouth noises, and profane and obscene expressions, in the reserved portion of the premises, justified him in quitting.

19. *Partial Eviction by Lessor, Effect of.*—On the ground that a tort-feasor cannot apportion his own wrong, it is generally held that an eviction by the lessor from a part of the premises suspends the entire rent until the tenant is restored to the full possession thereof: *Clun's Case*, 10 Rep. 128; *Cibil v. Hill*, 1 Leon. 110; *Dorrell v. Andrews*, Hob. 190; *Upton v. Townend*, 17 Com. B. 30; *Dyett v. Pendleton*, 8 Cow. 731; *Kessler v. McConachy*, 1 Rawle, 443; *Tiley v. Moyers*, 43 Pa. St. 404; *Vaughan v. Blanchard*, 1 Yeates, 175; *Lewis v. Payn*, 4 Wend. 423; *Royce v. Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322; *Christopher v. Austin*, 11 N. Y. 216; *Leishman v. White*, 1 Allen, 487; *Smith v. Wise*, 58 Ill. 141; *Skaggs v. Emerson*, 50 Cal. 6. But in Alabama a different rule prevails, and the rent is discharged only *pro tanto*, to the extent of the value of the part of the premises of which the tenant is dispossessed, if he remains in undisturbed possession: *Warren v. Wagner*, 75 Ala. 188; 51 Am. Rep. 446, approved in *Cook v. Anderson*, 85 Ala. 99.

Whether the lease itself is abrogated by a partial eviction is a question which is left in some uncertainty by the authorities. The only case which we have found, in which it was actually necessary to decide this point, is *Morrison v. Chadwick*, 7 Com. B. 266. There the court, after stating the rule as it is given in the preceding paragraph, added: "But there is no authority for holding that the tenancy is thereby put an end to, or the tenant discharged from the performance of his covenants, other than the covenant for the payment of rent." On the other hand we find judges declaring that a partial eviction "terminates" the lease: *Hayner v. Smith*, 63 Ill. 430; *Lawrence v. French*, 25 Wend. 443. The authorities cited are *Leishman v. White*, 1 Allen, 489; *Shumway v. Collins*, 6 Gray, 227; *Christopher v. Austin*, 11 N. Y. 216; *Smith v. Raleigh*, 3 Camp. 513. These cases, however, simply assert the familiar principle that the tenant, when evicted from a part of the premises, has a right, not only to be discharged from the payment of the rent until restored to full possession, but to abandon the premises also; and *Morrison*

v. *Chadwick*, 7 Com. B. 266, contains nothing that can be construed as a denial of the correctness of this principle, while it certainly is a direct authority to the point that the lease is not "terminated." In the absence, therefore, of any explicit ruling to the contrary, this English case must be accepted as good law, but it is, we think, *strictissimi juris*. The court, referring to the argument of counsel that a partial eviction often deprived the tenant of his main inducement to enter into the covenants of the lease, remarked that he had a right of action against his lessor for the eviction, and that it was to be presumed he would thereby obtain satisfaction for any inconvenience which he might suffer. This method of adjusting the rights of the parties seems unsatisfactory, and would not, in practice, be at all adequate to do justice to the tenant. If the lease still continues in force, there seems to be no escape from the conclusion that the tenant, after abandoning, must resume possession whenever the landlord chooses to restore to him the entire premises, and, if so, the tenant makes other arrangements for carrying on his business at the risk of being called upon to return to his former premises at any time, as long as the term lasts, and is liable for the rent, if he refuses to re-enter. The extreme hardship of such a position need not be enlarged upon. A doctrine better calculated to secure justice seems to be suggested by the rulings of the courts in cases where, by statute or express agreement, the tenant has the right to abandon the premises if they become untenable—the accepted rule being that, unless the repairs are made in a reasonable time, a temporary abandonment may be made permanent: *Miller v. Benton*, 55 Conn. 529; *Smith v. McLean*, 123 Ill. 210. See sec. 9 (b) and (c), *ante*. There certainly can be no objection, on the score of unfairness, to the establishment of a general principle which would cover the circumstances both of these cases and of *Morrison v. Chadwick*, 7 Com. B. 266, and which might be formulated thus: Whenever the law allows a tenant to abandon the premises until the landlord removes the conditions which create that right, the landlord cannot demand that the tenant shall resume possession, unless those conditions are removed in a reasonable time.

The general principle that a partial eviction suspends the whole rent does not apply, where the lessor sells a part of the reversion for his own convenience. If his grantee then wrongfully enters, the rent will be suspended only as to the parcel sold: *Reed v. Ward*, 22 Pa. St. 144; even though the lessor, after the severance of the premises, becomes a party to the trespass of the grantee: *Linton v. Hart*, 25 Pa. St. 196.

BOARD OF COUNTY COMMISSIONERS v. NELSON.

[51 MINNESOTA, 79.]

OFFICERS—LIABILITY OF COUNTY TREASURER FOR PAYING FORGED CERTIFICATES.—The failure of a county treasurer to satisfy himself of the genuineness of the indorsements upon certificates made payable to the order of the persons therein named is negligence, which, if the indorsements prove to have been forged, renders him liable for the loss suffered by the county, especially where the indorsee presenting such certificates for payment is a deputy clerk who had the opportunity of fraudulently issuing them, and has actually done so. Nor is the treasurer, in such a case, relieved of his liability by the fact that another officer is also answerable for the misfeasances of the deputy clerk.

PUBLIC AGENTS, MISFEASANCES OF, NO ESTOPPEL RAISED BY.—The wrongful acts of the officers of a municipal corporation cannot create an estoppel against the corporation, the taxpayers, or the people.

ACTION to recover moneys paid by the defendant upon fraudulent certificates for jury duty.

G. J. Lomen, and Munn, Boyesen, and Thygeson, for the appellant.

Thomas D. O'Brien and Pierce Butler, for the respondent.

§1 COLLINS, J. Appeal from an order overruling a demurrer to the complaint herein, interposed on three distinct grounds, only one of which need be considered, namely, that facts sufficient to constitute a cause of action were not stated therein. The pleading in question was purposely drawn very full and complete, in order that §2 all of the facts on which defendant's liability must rest, if at all, might appear. It seems from the allegations, that during the years 1889 and 1890 defendant was the treasurer of Ramsey county, while during the same period of time R. T. O'Connor and J. P. Davis were clerk and deputy clerk, respectively, of the district court. Between January 5, 1889, and December 1, 1890, Davis, as such deputy clerk, wrongfully and unlawfully prepared and executed a large number of jurors' certificates (Special Laws 1877, c. 214, sec. 6; 1878 Gen. Stats., c. 70, sec. 30) in each of which he falsely stated and certified that a certain person therein named, the name being different in each certificate, had attended upon the district court as a petit juror a specified number of days, and that there was due to such person from the county treasury a certain named sum of money, which sum was payable to his order. The seal of the court was duly attached to each of these certificates. None of the persons so named had attended said court as jurors or otherwise, nor was there due to any or either of them any sum of money whatsoever from the county treasury. In brief, the certificates were spurious in every particular, and were executed for the purpose of defrauding the county out of a large sum of money; and in furtherance of the scheme, Davis, as they were issued, presented them to the county auditor to be audited and allowed: Laws 1879, c. 13, sec. 123. The latter, in writing and over his official signature, indorsed upon the back of each certificate a direction to the county treasurer to "pay within amount from revenue fund," and returned the same to Davis. Thereupon the latter forged and indorsed upon each

the name of the person to whom it had been made payable, presented the same from time to time to defendant treasurer for payment, and by him was paid out of the county treasury the amounts for which these certificates were drawn. The magnitude of the scheme, and the extent to which it was carried before detection, will be appreciated when we state that on the argument it appeared that Davis in the same manner obtained from defendant's predecessor in office over eight thousand dollars in a little more than one year, and that, according to the complaint, he issued thirteen hundred and twenty eight of these fraudulent certificates in the two years before mentioned, and was paid thereon nearly sixteen thousand dollars by defendant treasurer. According to the allegations ⁸² of the complaint, we have a case then where certificates for jurors' services in district court, valid on their face, but fraudulent in fact, have knowingly been issued by a deputy clerk of said court, each for a stated amount, payable to the order of the alleged juror, his name being given in each instance, on the back of which there was written by the county auditor an order upon the treasurer to pay the amount out of the revenue fund. These certificates, with the auditor's order on the back, were presented to defendant treasurer for payment by the deputy clerk, with the names of the alleged jurors to whom they were made payable, forged and indorsed upon each by this same deputy, and to him defendant made payment with county funds of the various sums purporting to be due.

The question now before us is as to defendant's liability to the county for the amounts so paid out. The distinction between a case arising on these facts and that cited by appellant's counsel, of *Sweet v. County Commrs.*, 16 Minn. 106, is obvious. There the county orders or warrants had been issued and accepted, made payable to a certain named person or to bearer. They were transferable by simple delivery, and in terms the treasurer was expressly authorized to pay to the bearer. This he did, without knowledge of any defect in the title of the bearer, and it was held, such payment being in good faith every way, that the county was exonerated from further liability. The conclusion of the court was expressly placed upon the fact that in good faith the county treasurer had paid these obligations precisely as he was authorized and directed to do, to the person who presented them, the bearer thereof. But the cases are not analogous, for, giving to de-

defendant the benefit of all that is possible, namely, that together the certificates as issued and the indorsements thereon as made by the county auditor amounted to orders or warrants upon the county treasury, the prominent and stubborn fact remains that the amounts said to be due therein were not to be paid to a bearer of the instruments, but to the order of the several persons named therein as payees. As in the case just referred to, the authority to pay was express and distinct, but instead of directing that such payment should be to whomsoever might present the orders or warrants, the ⁸⁴ direction was that payment should be made to the order of a person designated by name. And at this time it may be well to state that it does not appear in the complaint, as appellant's counsel seem to assume, that fictitious or nonexistent persons were named as payees in these certificates. It is of no importance, probably, but from the language of the pleading the presumption is otherwise. Payments were not made to the persons named as payees, or to their order, in accordance with the terms of the certificates, but were made to Davis, the very person who as deputy clerk had the opportunity and had fraudulently issued the same, solely upon the false and forged indorsements of the names of the payees. Common prudence ought to have suggested to defendant that before making such payments it was incumbent upon him to ascertain and satisfy himself of the genuineness of the signatures which he found indorsed upon the backs of the instruments purporting to be those of the payees therein named. He failed so to do, and this of itself is sufficient to sustain the charge of negligence in the performance of his official duty. As was said by the learned trial judge, had defendant observed the rule of law which governs in commercial transactions of the same nature, he would have detected the forgeries at the outset, and there could have been no great loss to the county or to himself. His disregard of this rule was negligence undoubtedly, and it was the immediate and proximate cause of the loss to the county, for which defendant must be held responsible, unless the fact that the certificates were fraudulently issued by the deputy of another county officer, for whose malfeasances such officer was also responsible to the county, can be allowed to excuse and relieve him.

The instruments in question were certificates of indebtedness for juror's services, falsely stated to have been rendered by the payees therein named, and on whose order payment

was to be made. At most, they were the orders of one officer of a municipal corporation upon another officer, for the paying out of municipal funds. Although negotiable in form, they were not commercial paper in any sense. That they were in fact fraudulently issued could not relieve the defendant treasurer from the obligation which rested upon him to see to it that he paid the same to the persons to whom payment was ^{ss} directed. Had he done this in good faith, we are unable to see why his duty would not have been performed, and in his failure to pay as directed, lies the claim that he was negligent. Had the certificates been regularly issued, payment upon forged indorsements would not have excused the defendant treasurer, nor could it have relieved the county from a just indebtedness for jurors' services.

The liability of the county treasurer for the funds intrusted to his care cannot be allowed to depend upon the fidelity of some other county officer, but is with him alone and to be determined by his actions. Nor can the right of the county to require of him that he account for the public funds be limited or controlled by the fact that it may also look elsewhere for relief in case of loss. For the bad conduct of the deputy in fraudulently issuing the certificates the county may have a right of action against his principal, the clerk of court; but it is not confined to that action—it is not obliged to look to him alone. Unless it be upon the theory that as these certificates were issued without the rendition of services, and fraudulently, the payees must necessarily have been fictitious and nonexistent, we do not quite understand the assertion of counsel that no payees were named, and therefore the instruments were payable to bearer, or the pertinency of the authorities collated by counsel to the effect that where a payee's name is left blank in a bill or note when the same is issued, such bill or note is in legal effect payable to bearer, and until the payee is actually named the paper will circulate as though made payable to bearer in terms. We have already stated that from the averments of the complaint the presumption is that the payees named were not fictitious or nonexistent, but, in any event, the weight of authority is that the rule cited by counsel applies only to paper put into circulation by a maker with knowledge that the name of the payee does not represent a real person: *Shipman v. Bank of New York*, 126 N. Y. 318; 22 Am. St. Rep. 821. The rule can have no application to the issuance of county orders or warrants.

There is absolutely nothing in the appellant's position that the county is estopped from saying that the payees named were fictitious and the indorsements forged. The wrongful acts of the officers of a ^{ss} municipal corporation cannot create an estoppel against the corporation, the taxpayers, or the people: *Mayor v. Ray*, 19 Wall. 468.

Order affirmed.

MUNICIPAL CORPORATIONS—LIABILITY FOR WRONGFUL ACTS OF OFFICERS OR AGENTS.—No general liability exists on the part of a municipal corporation for the wrongful acts of its officers or servants: *Caspary v. Portland*, 19 Or. 496; 20 Am. St. Rep. 842, and note. A municipal corporation is not liable for the tortious acts of its officers or agents unless it is within the scope of the corporate powers as prescribed by its charter or by some positive enactment: *Orlando v. Pragg*, 81 Fla. 111; 34 Am. St. Rep. 17, and note. See, also, the extended note to *Goddard v. Harpswell*, 30 Am. St. Rep. 376.

YOUNGBERG v. NELSON.

[51 MINNESOTA, 172.]

NEGOTIABLE INSTRUMENTS—PAROL EVIDENCE INADMISSIBLE TO CONTRADICT INDORSEMENT.—The indorsement of commercial paper, "without recourse," creates an express and complete contract, which cannot be varied or contradicted by parol evidence of a contemporaneous agreement by which the indorser undertook to be liable, as guarantor, for the payment of the instrument.

ACTION on an oral contract of guaranty.

Gjertsen and Rand, for the appellant.

F. B. Wright, for the respondent.

¹⁷² MITCHELL, J. The defendant transferred the promissory note of a third party to plaintiff by indorsement "without recourse," and the only question necessary to be considered is whether evidence of a contemporaneous oral guaranty of payment was admissible.

We are clearly of the opinion that the case falls within the familiar elementary rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written contract.

The parties have put their engagement into writing (as evidenced by the qualified indorsement) in terms that are certain as to the object and extent of such engagement. It is therefore conclusively presumed (in the absence of any

showing of fraud or mistake) that their whole engagement on the subject covered by the indorsement was reduced to writing.

While, by the very act of transferring paper, whether by indorsement or mere delivery, a party engages that it is what it purports to be—the valid obligation of those whose names are upon it—and that he has good title to it, yet when the indorsement is “without recourse” the indorser specially declines to assume any responsibility for its payment. According to the meaning of the terms in the law merchant, this is the express condition of the contract, as much as if stated in detail in so many words. That evidence of a contemporaneous oral agreement that the indorser should be liable, as guarantor, for the payment of the note, would vary and contradict the terms of such a written contract, would seem self-evident.

This court has steadily held, from the early cases of *Levering v.* ¹⁷⁴ *Washington*, 3 Minn. 323, and *Kern v. Von Phul*, 7 Minn. 426, 82 Am. Dec. 105, down to *Farwell v. St. Paul Trust Co.*, 45 Minn. 495, 22 Am. St. Rep. 742, that the implications and intendments which the law merchant has attached to blank indorsements of negotiable paper render them express and complete contracts, which cannot be varied or contradicted by parol; as, for example, that an indorser cannot show that the indorsement was merely for the purpose of transferring title, and that there was an oral agreement that it was to be without recourse.

If this rule is applicable when invoked against the indorser, it must also be so when invoked in his favor. Neither can it make any difference whether the indorsement is qualified or unqualified.

Order reversed.

PAROL EVIDENCE TO CONTROL OR VARY EFFECT OF INDORSEMENT OF NEGOTIABLE INSTRUMENTS: See the extended notes to *Hill v. Ely*, 9 Am. Dec. 381-385; and *Stark v. Beach*, 39 Am. Rep. 116-119. The liability of an indorser of a negotiable instrument cannot be varied by parol: *Farwell v. St. Paul Trust Co.*, 45 Minn. 495; 22 Am. St. Rep. 742, and note; *Shaw v. Shaw*, 50 Me. 94; 79 Am. Dec. 605, and note; *Vore v. Hurst*, 13 Ind. 551; 74 Am. Dec. 268, and note; *Sanborn v. Southard*, 25 Me. 409; 43 Am. Dec. 288, and note; *Doolittle v. Ferry*, 20 Kan. 230; 27 Am. Rep. 166, and note; *Charles v. Denis*, 42 Wis. 56; 24 Am. Rep. 383; *Allen v. Rundle*, 50 Conn. 9; 47 Am. Rep. 599; *Rodney v. Wilson*, 67 Mo. 123; 29 Am. Rep. 499; *Kingsland v. Koeppe*, 137 Ill. 344.

DENNIS v. SPENCER.

[51 MINNESOTA, 250.]

INTERVENTION, WHEN NOT PERMISSIBLE.—Permission to intervene in an action brought by the assignee of a contract of sale to recover the balance of the sum due upon the contract is properly denied, where the complaint of the applicant, a judgment creditor of the assignor of the contract, merely alleges that the assignment was fraudulent, that the assignor is entitled to the money sued for, and that the plaintiff has attached that money in garnishment proceedings duly instituted against the assignor, and still undetermined.

INTERVENTION, INTEREST NECESSARY TO ENTITLE THIRD PARTY TO PRIVILEGE OF.—The interest which entitles a party to intervene in an action between other parties must be in the matter in litigation in the suit as originally brought, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal effect of the judgment therein.

EBEN DENNIS, having made a contract for the sale of five hundred steers to Samuel Spencer, assigned the contract to the plaintiff, T. A. Dennis. When the contract was entered into, Spencer paid five hundred dollars to Eben Dennis, and this action was brought by T. A. Dennis to recover the balance of the purchase money. This complaint set up a contract between himself and Spencer, but, after a verdict had been directed in his favor, an order denying a new trial was reversed by the appellate court on the ground that there was a fatal variance between the allegations and the proof. The complaint was then amended, so as to aver the making of a contract between Eben Dennis and Spencer, and the assignment to the same to the plaintiff. The tenor of the complaint in intervention sufficiently appears from the opinion and the head-note. The court directed a verdict for the plaintiff, and refused to permit the intervention asked for.

J. V. V. Lewis, G. M. Nelson, and O. J. Cook, for the appellants.

E. P. Peterson and R. H. McClelland, for the respondent.

200 COLLINS, J. The nature of this action will sufficiently appear upon the perusal of an opinion filed on the determination of a former appeal: *Dennis v. Spencer*, 45 Minn. 250. Thereafter answer was made to an amended complaint, and one of these appellants then filed his complaint in intervention, claiming a right so to do under the provisions of 1878, General Statutes, chapter 66, section 131. At 201 the trial of the action this pleading was stricken out on plaintiff's motion,

and an application for leave to interpose and serve another complaint in intervention was denied by the court. The verdict was against the defendant, and the appeals by him and by the intervener are from orders refusing a new trial.

The only question in the case which we need to determine is the right of the appellant last named to intervene and participate in the trial of the action. The allegations found in the answer and in the complaints in intervention were the same in substance. The alleged transfer and assignment of the original vendor's rights and interests in the cattle contract were denied. It was alleged that the cattle in question were actually delivered to defendant by said original vendor, and not by his pretended assignee, the plaintiff; that at the time of this delivery appellant's intervener had procured and held an unsatisfied and uncollectible judgment against said vendor for a certain amount, which judgment had previously been duly entered and docketed in a domestic court of competent jurisdiction; that thereupon said intervener had duly instituted garnishment proceedings, in which proceedings defendant was named as garnishee, and said original vendor, the judgment debtor, was made defendant, and that the proceedings in garnishment were still pending and undetermined. There were also several formal allegations in these pleadings, which need not be specially referred to.

It is claimed by the appellants that by service of the garnishment process upon defendant a lien upon the debt in controversy was acquired, which gave the holder of the lien an absolute right to intervene, and thereafter participate in the litigation between plaintiff and defendant; *Wohlwend v. J. I. Case Threshing Mach. Co.*, 42 Minn. 500, being relied upon to support this position. In that case the intervener was a mortgagee of personal property, which was destroyed by the alleged negligence of a third party, defendant in the action. The intervener, by virtue of its chattel mortgage, had the legal title to the property destroyed, and the right to take immediate possession. The debt was past due, and in amount exceeded the value of the property when destroyed. It was held that the intervener had such an interest as entitled it to the ²⁶² benefit of the statute (section 131, *supra*), as the same had been carefully construed in the case of *Lewis v. Harwood*, 28 Minn. 428, in which it was said that the interest which entitles a party to intervene in an action between other parties must be in the matter in litigation in the suit as

originally brought, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal effect of the judgment therein. Tested by this rule, it is impossible to see how the appellant Nelson could be permitted to intervene. He had no direct or immediate interest in the pending litigation; if we give full credence to the allegations in respect to the garnishment proceedings found in his complaint as well as in defendant's answer. He could lose nothing by the judgment rendered herein, nor could he profit by it. His legal rights had been asserted by means of the garnishee proceedings, and he could fully protect such rights through the same. Under the terms of section 174, chapter 66, *supra*, the present plaintiff, making a claim to the money in question, could have been brought into the controversy, or could have been allowed to participate as a claimant, the result binding him in the same manner as if he had been an original party. From the complaint in intervention it appeared affirmatively that appellant Nelson was not entitled to intervene.

Concerning the question of practice raised by appellants, it can be said that, if the court below ruled erroneously, it was error without prejudice.

Order affirmed.

INTERVENTION—WHO MAY INTERVENE.—The interest which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment: *Horn v. Volcano Water Co.*, 13 Cal. 62; 73 Am. Dec. 569, and note; *Brown v. Saul*, 4 Martin. N. S., 434; 16 Am. Dec. 175, and extended note; *Henry v. Travelers' Ins. Co.*, 16 Col. 179; *Curtis v. Lathrop*, 12 Col. 169; *Kansas etc. Ry. Co. v. Fitzgerald*, 33 Neb. 137; *Shannahan v. Stevens*, 139 Ill. 428; *Stansell v. Fleming*, 81 Tex. 294; *Robinson v. Crescent City etc. Co.*, 93 Cal. 316; *Morey v. Lett*, 18 Col. 128. See further the note to *Lacroix v. Menard*, 15 Am. Dec. 162.

WACEK v. FRINK.

(51 MINNESOTA, 282.)

NEGLIGENCE—LIABILITY OF A SEARCHER OF RECORDS.—A searcher of records who, in the preparation of an abstract of title, assumed the information derived from a marginal reference in the record book to be correct, does so at his peril, and is liable in damages to an employer who suffers loss owing to his omission to examine the record of the instrument referred to.

ACTION for damages sustained from the incorrectness of an abstract of title furnished by the defendant.

M. H. Keeley, and Southworth and Collier, for the appellant.

G. W. Batchelder, for the respondent.

282 MITCHELL, J. The plaintiff employed the defendant, who was engaged in that business, to prepare and furnish her an abstract of title, as the same appeared of record, of eighty acres of land. In pursuance of this contract defendant furnished plaintiff what he certified to be a true and correct abstract of the title of the land "as the same appears on the original records of the register's office, which has been carefully reviewed and compared to date." This abstract, which purported to be a short summary or index of all the instruments of record affecting the title, giving the names of the parties, the character of the instrument, etc., showed that the then owner of the land had executed a mortgage upon it and other lands for eleven hundred dollars, and that the mortgagee had assigned it to one West, who subsequently assigned it to one Berry. But the abstract also stated that a "satisfaction" of this mortgage executed by Berry was of record, giving the date and place of record. Relying upon this abstract, the plaintiff purchased and paid for the land. It was subsequently discovered, however, that the mortgage on this land had never in fact been satisfied or released; that the instrument which was described in the abstract as a satisfaction was merely a release of the other lands, but retained the lien of the mortgage on the land purchased by plaintiff. As a consequence, plaintiff has been compelled to pay the mortgage, and her grantor being insolvent, she sues the defendant for damages.

The explanation and excuse which defendant makes is that when the partial release was recorded, the register of deeds, in his reference to it on the margin of the record of the mort-

gage, erroneously made the entry "Satisfied" (with a reference to the book and page where recorded) when in fact it should have been "Partially satisfied" or "Partially discharged," and that in making up the abstract, ²⁸⁴ he relied upon this marginal entry, supposing it to be correct, and did not examine the contents of the instrument of release itself.

Upon this state of the evidence the court left it to the jury to say whether or not the defendant was guilty of negligence. In this we think the court erred.

The court correctly stated the rule of law to be that in furnishing this certificate of title as the same appeared of record, the defendant did not become a guarantor of the title, but was only liable for the consequences of his want of proper care or skill in the preparation of the abstract. But we think the learned judge made a wrong application of the rule to the facts of this case. The fair and reasonable import of defendant's undertaking was to obligate him to make a full and true search and examination of the records relating to the title of the land, and to note upon the abstract accurately every transfer, conveyance, or other instrument of record in any way affecting the title: *Wakefield v. Chowen*, 26 Minn. 379. This was what he certified he had done. He was not required to give any opinion as to the legal effect of any of the instruments, and just how full or minute a description of them he should give was, perhaps, to a certain extent, a matter for himself to decide; but in so far as he assumed to describe them, certainly due care and skill required that such description should be accurate. The record, and not a marginal reference to it by the register (which is required merely for convenience in making searches) is what determines the character and legal effect of an instrument; and the duty of an examiner of titles is not fulfilled by merely assuming the accuracy of such a reference, without examining the instrument itself.

Any other rule would render abstracts of title so unreliable as to be of little value. Instead of leaving the question to the jury, the court ought to have instructed them that in failing to examine the record of the instrument itself the defendant was guilty of negligence.

In conclusion we may add that the former action was no bar, and the evidence relating to it ought not to have been admitted. Upon the question whether plaintiff had paid the mortgage, we think there was, under the evidence, nothing to

be submitted to the jury. Part ²⁸⁵ of it had been paid in money, and when plaintiff sold the land the purchaser, in part payment of the purchase money, gave his note secured by a new mortgage in place of the one given by plaintiff's grantor. This amounted to payment by plaintiff.

Order reversed and new trial ordered.

SEARCHERS OF RECORDS.—LIABILITY FOR FAILURE TO EXERCISE CARE AND SKILL IN EXAMINING TITLES: See *Lattin v. Gillette*, 95 Cal. 317; 29 Am. St. Rep. 115, and *Dickle v. Abstract Co.*, 89 Tenn. 431; 24 Am. St. Rep. 616, and note.

WRIGHT v. LARSON.

[51 MINNESOTA, 321.]

CHATTEL MORTGAGES, PRIORITIES BETWEEN—MORTGAGEE IN GOOD FAITH, WHO IS.—A subsequent mortgagee cannot obtain priority for his lien over an earlier unrecorded mortgage, unless he shows that he is a mortgagee in good faith, a term which, in such cases, means "without notice" as well as "for a valuable consideration"; but good faith is *prima facie* made out by proof that the second mortgage was taken for a valuable consideration and in the ordinary course of business.

Mosness, the intervener, entered into a contract with Larson, by which the latter was to farm land on shares. Under this contract Mosness was to retain the title to all crops raised on the farm, until a division thereof was made, and Larson's share was to be subject to a lien in favor of Mosness as security for any existing or future indebtedness to the latter. The contract was never filed. Larson subsequently executed a chattel mortgage on his half-interest in the crops to the plaintiff, which mortgage was duly filed. The remaining facts appear sufficiently in the opinion.

A. Ross, for the appellants.

George E. Perley and J. E. Greene, for the respondent.

³²² MITCHELL, J. This action was brought to recover possession of a quantity of wheat, to which plaintiff claimed to be entitled under a chattel mortgage executed by defendant April 21, 1890, and duly filed the same day. The defense of the defendant was that the mortgage was obtained by false and fraudulent representations.

The intervener came in, and claimed the property under the lease or contract between himself and defendant, executed

July 16, 1889, and which was never filed. Plaintiff traversed both the answer of the defendant and the complaint of the intervener. The decision being in favor of the plaintiff on both issues, the defendant and the intervener both appealed.

1. In defendant's appeal there is no case or bill of exceptions, the only point made being that the special findings of the trial court amount to a finding of all the facts essential to avoid plaintiff's chattel mortgage on the ground of fraud. All we deem necessary to say with reference to this is that an examination of the findings shows that this is not so.

2. The intervener takes exception to the sufficiency of plaintiff's complaint, and also to the sufficiency of the description of the property ³²³ in his chattel mortgage. We think there is no merit in either point. While, perhaps, not grammatically expressed, the description in the mortgage clearly covers one-half interest in all wheat that should be raised on the land referred to during the year 1890, whether then sown or to be thereafter sown.

We do not deem it necessary to consider whether the contract between intervener and defendant was in fact a lease, and created the relation of landlord and tenant, or was a mere contract of hiring. The intervener has declared on it as a lease, and without determining its exact character, or what were the respective rights of intervener and defendant in the grain before division, we think there was evidence which justified the court in finding that the grain had been divided, and the part out of which the grain in controversy was taken had been set apart as the property of the defendant, subject only to a lien in favor of the intervener for any general indebtedness of the defendant to him, as provided in the lease. This clause in the lease was, in effect, a chattel mortgage, and came under the provisions of the statute providing that mortgages of personal property, not accompanied by immediate delivery and followed by actual and continued change of possession, shall be void as against subsequent purchasers and mortgagees in good faith, unless filed, etc.: *Merrill v. Ressler*, 37 Minn. 82; 5 Am. St. Rep. 822.

The burden was undoubtedly upon plaintiff, a subsequent mortgagee, as against intervener, a prior mortgagee, to prove that he took his mortgage in good faith; and, under the decisions of this court, "good faith," in such cases, means "without notice," as well as "for a valuable consideration": *Bank of Farmington v. Ellis*, 30 Minn. 270; *McNeil v. Finnegan*, 88

Minn. 375; *Tolbert v. Horton*, 31 Minn. 518. But proof that the second mortgage was taken for a valuable consideration, and in the ordinary course of business, is, in the absence of any opposing suspicious circumstances, sufficient to make out a *prima facie* case of good faith: *Bank of Farmington v. Ellis*, 30 Minn. 270. The findings are general, but necessarily include, by implication, a finding that the plaintiff's mortgage was taken in good faith. While the evidence is not of the most satisfactory character, ³²⁴ yet we are of opinion that it justified the finding, in the absence of any opposing evidence on the part of the intervener.

In both appeals the order appealed from is affirmed.

MORTGAGEE—PRIORITY—MORTGAGEE IN GOOD FAITH.—A subsequent mortgagee with notice of a prior mortgage is not a subsequent mortgagee in good faith: *Miltonville State Bank v. Kuhle*, 50 Kan. 420; 34 Am. St. Rep. 129, and note; *Howard v. First Nat. Bank*, 44 Kan. 549; *Huling v. Abbott*, 86 Cal. 423; *Short v. Fogle*, 42 Kan. 349. One who takes a conveyance of lands with notice of a prior unrecorded mortgage is not a *bona fide* purchaser who can gain a priority by having his mortgage first recorded: *Dunham v. Dey*, 15 Johns. 554; 8 Am. Dec. 282, and note. One who takes a conveyance of land, with notice of an outstanding equitable right or title in a third person, takes it subject to such outstanding right: *McCone v. Cawser*, 64 N. H. 506.

MORTGAGES—PRIORITY—EXTENT OF LIEN—NOTICE.—A second mortgagee with notice of his mortgagor's mortgage on the same land can enforce his lien only to the extent of his mortgagor's claim. If he is without notice, he can enforce his lien to the extent of his entire mortgage debt: *Tarman v. Bell*, 54 Ark. 273; 26 Am. St. Rep. 35, and note.

DYER v. GREAT NORTHERN RAILWAY COMPANY.

[61 MINNESOTA, 345.]

CARRIER, DELIVERY OF GOODS TO, PASSES TITLE TO CONSIGNEE.—The legal presumption is that upon the delivery of goods to a common carrier the title thereto vests in the consignee, and the carrier, having the right to rely upon this presumption, in the absence of express notice from the consignor to the contrary, may settle with the consignee in case the property is lost, stolen, or destroyed.

CARRIERS, LIABILITY OF, TO CONSIGNEE.—The consignment of a chattel by a common carrier to one who has purchased it on the understanding that the title thereto is not to vest in him until the price is fully paid gives him a special property in such chattel, and, if it is destroyed while in the carrier's possession, he is entitled to recover its full value from the latter.

NOTICE OF TITLE TO CHATTEL, CARRIER NOT AFFECTED WITH, BY FILING OF BILL OF SALE.—The registration of a conditional contract of sale, accord-

ing to the provisions of the Minnesota statute, does not affect a carrier who has received the subject matter of the contract for transportation to the vendee, with notice of the fact that the title to the property is still in the vendor. Hence, if the property is destroyed while in the carrier's hands, he may show, in bar of an action by the seller to recover its value, that a settlement has already been made with the vendee.

M. D. Grover and R. A. Wilkinson, for the appellant.

McLaughlin and Morrison, for the respondents.

²⁴⁷ COLLINS, J. Plaintiffs were the consignors, one Colwell, the consignee, and defendant, the common carrier, of a piano shipped from Minneapolis to Anoka over its line of railway. When the instrument was delivered to defendant for carriage, its agent gave the usual bill of lading to plaintiffs, and this was immediately transmitted by them to Colwell, the consignee. Soon after its arrival at Anoka, and before Colwell had the opportunity to remove it from the depot, the piano was destroyed by fire. Thereupon Colwell made a claim upon defendant for its value, producing the bill of lading and an invoice, from which it appeared that he had purchased the piano from plaintiffs, and had partly paid for the same. The fact was that the sale to Colwell was conditional, a written contract having been made that the title to the instrument should remain in plaintiffs until Colwell paid for it in full, and a copy of this contract had been duly filed in the office of the proper city clerk a few days before the fire, in compliance with the provisions of the statute: Gen. Stats. 1878, c. 39, secs. 15, etc. Defendant had no actual knowledge of this, and had not been advised in any manner as to plaintiffs' claim upon the piano when, in settlement of Colwell's demand, it paid to him its full value.

It is thoroughly settled that if no other facts appear the consignee, and not the consignor, of property delivered to a common carrier must be considered its owner: *Benjamin v. Levy*, 39 Minn. 11. The legal presumption is that upon the delivery of ²⁴⁸ goods to a common carrier the title thereto vests in the consignee, and this presumption the carrier has a right to rely upon, in the absence of express notice from the consignor to the contrary. The carrier, therefore, has the right to settle with the consignee in case the property is lost, stolen, or destroyed: *Scammon v. Wells, Fargo & Co.*, 84 Cal. 311; *Pennsylvania Co. v. Holderman*, 69 Ind. 18; 2 Am. & Eng. Ency. of Law, 810, 811, and cases cited in notes.

Again, upon the stipulated facts, Colwell had a special property in the instrument, and as a special owner could recover its full value from the defendant: *Chamberlain v. West*, 37 Minn. 54. See, also, *Jellett v. St. Paul etc. Ry. Co.*, 30 Minn. 265; *Brown v. Shaw*, 51 Minn. 266; *Marsden v. Cornell*, 62 N. Y. 215; *Boston etc. R. R. Co. v. Warrior Mower Co.*, 76 Me. 260; *White v. Webb*, 15 Conn. 805. Counsel for respondents do not take issue upon these propositions, but insist that, on the filing of a copy of the conditional contract of sale, as before stated, defendant carrier had notice that their clients retained title to the property, and was bound by such notice. The statutes (Gen. Stats. 1878, secs. 15, etc.) have no application. They were enacted for the benefit and protection of the parties therein mentioned, namely, creditors of the vendee, subsequent purchasers, and mortgagees in good faith, and the well-established rules of law fixing defendant's liability as a common carrier were in no manner affected by the provisions therein contained.

Order reversed.

SALES—DELIVERY TO CARRIER.—Delivery of goods to a carrier under an executory contract of sale vests the title in the vendee, if they correspond with the contract: *Pierson v. Crooks*, 115 N. Y. 539; 12 Am. St. Rep. 831, and note; *Commonwealth v. Fleming*, 130 Pa. St. 138; 17 Am. St. Rep. 763. A delivery of goods to a carrier indicated by the vendee is a delivery to the vendee: *Bradford v. Marbury*, 12 Ala. 520; 46 Am. Dec. 264; *Diversy v. Kellogg*, 44 Ill. 114; 92 Am. Dec. 154, and note; *Krudler v. Ellison*, 47 N. Y. 36; 7 Am. Rep. 402. If the contract of purchase be silent as to the person or mode by which the goods are to be sent, a delivery by the vendor to a common carrier in the usual course of business transfers the property to the vendee: *Magruder v. Gage*, 33 Md. 344; 3 Am. Rep. 177; *Loyd v. Wight*, 20 Ga. 574; 65 Am. Dec. 636, and note; *Hall v. Richardson*, 16 Md. 397; 77 Am. Dec. 303, and note; *Sarbecker v. State*, 65 Wis. 171; 56 Am. Rep. 624, and note. See further the extended note to *McNeal v. Brown*, 26 Am. St. Rep. 451.

WYLIE v. GRUNDYSEN.

[51 MINNESOTA, 300.]

EXECUTIONS.—A GRANARY WHICH IS APPURTENANT TO AN EXEMPT HOMESTEAD IS ITSELF EXEMPT, and its severance from the freehold through the wrongful act of a trespasser does not deprive it of its exempt character.

EXECUTIONS—JUDGMENT FOR VALUE OF CONVERTED PROPERTY WHEN EXEMPT FROM LEVY.—A judgment recovered for the value of an exempt granary, which has been severed from the homestead through the wrongful act of a trespasser, is to be treated as a judgment for exempt personal property, and is therefore exempt from execution.

EXECUTIONS—SHERIFF'S LIABILITY FOR VIOLATION OF EXEMPTION LAWS.—To fix a liability upon a sheriff for a wrongful levy upon an exempt judgment, he should be given proper notice, or demand should be made upon him before suit is brought, but proof that such demand was made is not necessary, if the proceeds of the execution sale were paid over before the plaintiff was duly notified of the levy, and thus enabled to make a reasonable demand.

Montague and Bucklen, for the appellant.

H. Steenerson, E. M. Stanton, and A. R. Holston, for the respondent.

301 VANDERBURGH, J. It is alleged and found that the plaintiff recovered a judgment against one Wyer for the unlawful taking, removal, and conversion of certain property described in the complaint as wheat, barley, and a certain frame building used as a granary, in which the grain mentioned was stored. It is also alleged, and so found, that the granary was situated upon plaintiff's exempt homestead, and a fixture thereon, and was accordingly exempt from levy and sale. The grain was also found to be exempt. The amount of the judgment so recovered was the sum of four hundred and sixty-eight dollars and seventy-six cents.

An execution was issued to the sheriff defendant in this action for the collection of this judgment March 24, 1891, and on the next day the defendant in the execution paid him, in satisfaction thereof, the 302 amount of the judgment, with interest and costs. Prior to the date last mentioned, there had been recovered judgments against the plaintiff, amounting to the sum of two hundred and sixty-seven dollars and sixty-nine cents, with interest and costs; and executions were duly issued on such judgments to the defendant, as sheriff, on the twenty-third day of March, 1891, and on that day he undertook to levy upon the first-mentioned judgment—that

is to say, it is found by the court that on the same day the defendant, as such sheriff, and for the purpose of levying such executions, made certified copies of both executions, and served them, together with his return, upon the clerk of the court, and notified the clerk of such levy, but did not serve the plaintiff, judgment debtor in the executions, and judgment creditor in the judgment levied on, until the thirtieth day of March, 1891. On the twenty-fifth day of March the defendant sheriff applied, of the money collected for plaintiff on his judgment, the sum of two hundred and sixty-seven dollars and sixty-nine cents in satisfaction of the executions against him; and it is to recover that sum as having been wrongfully so applied by the sheriff that this action is brought against him.

1. The exempt homestead included the granary as appurtenant to the premises, and necessary for the use of the family (1 Freeman on Executions, sec. 245; 1878 Gen. Stats, c. 68, sec. 1); and it did not lose its exempt character by reason of its severance from the freehold through the wrongful act of a trespasser. But, the severance having taken place, the owner of the exempt homestead to which it belonged might bring replevin, or sue for its conversion as personal property (*Washburn v. Cutter*, 17 Minn. 367) and the judgment recovered for the value of the grain and the granary in which it was stored may be treated as a judgment for exempt personal property, within the meaning of 1878 General Statutes, chapter 66, section 313, and accordingly exempt from levy upon execution.

2. But in order to fix a liability upon the sheriff for such wrongful levy upon the exempt judgment he should have had proper notice or a demand should have been made upon him before suit brought against him, unless prevented by his own conduct. This was not shown in the case, but the money was prematurely paid over or applied on the executions before the levy was completed by the proper notice to plaintiff so as to enable him to make a seasonable demand: ³⁶³ 1 Freeman on Executions, sec. 306. Such payment was unauthorized, and the necessity of proof of a demand was dispensed with.

Order affirmed.

HOMESTEAD—EXEMPTION OF APPURTENANCE.—A public grist-mill adjoining the owner's farm, but not inclosed with it is not a part of the homestead for purposes of exemption: *Mouriquand v. Hart*, 23 Kan. 594; 31 Am. Rep. 200.

EXECUTION—PROCEEDS OF JUDGMENT WHEN EXEMPT.—A judgment against a sheriff for the wrongful conversion by him of property exempt from sale under execution is, together with costs, also exempt: *Below v. Robbins*, 76 Wis. 600; 20 Am. St. Rep. 89, and note.

EXEMPTIONS.—REMEDY OF DEBTOR WHOSE RIGHTS HAVE BEEN VIOLATED: See the extended notes to *Van Dresor v. King*, 75 Am. Dec. 645, and *Palmer v. Village of St. Albans*, 6 Am. St. Rep. 132. A sheriff or other officer has no right to take from a debtor, by virtue of process against him, property which is exempt from execution, if he does he will be liable for trespass: *People v. Clements*, 68 Mich. 655; 13 Am. St. Rep. 373, and note; *Harrington v. Smith*, 14 Col. 376; 20 Am. St. Rep. 272; *McCoy v. Brennan*, 61 Mich. 362; 1 Am. St. Rep. 589.

PIONEER SAVINGS AND LOAN CO. v. BARTSCH.

[51 MINNESOTA, 474.]

BOND TO SECURE MORTGAGE AGAINST PARAMOUNT LIENS, CONSTRUCTION OF.—A bond conditioned that a mortgagor shall erect a building on the mortgaged land within a specified time, pay all claims for labor and materials which are or may become liens on the land or building, and keep the security the first and paramount lien on the premises, is to be construed as a mere general contract of indemnity against paramount liens, and not as an undertaking to be bound by the result of any actions brought against the mortgagee by parties claiming such liens, or to assume the defense of such actions in the absence of any request by the mortgagee to do so.

JUDGMENT NOT BINDING IN SUBSEQUENT ACTION BETWEEN DEFENDANTS, WHEN.—Where, in an action against a landowner and his mortgagee to enforce a lien on the premises for materials furnished for the construction of a building thereon, neither of the defendants appears, and a personal judgment is rendered by default against the landlord and declared to be paramount to the lien of the mortgage, this judgment, in the absence of proof that the mortgagor was notified to assume the defense of the action, binds only the mortgagee upon the issue of the priority of the materialman's lien, and cannot be introduced as evidence of such priority in a subsequent action instituted by the mortgagee, after satisfying the judgment, to recover the amount paid from the mortgagor and his sureties.

George D. Emery, for the appellant.

George F. Edwards, for the respondents.

476 MITCHELL, J. It seems to us that the determination of this appeal hinges upon the single question whether the judgment in a previous action by the Minneapolis Glass Company against one Bartsch and the present plaintiff was evidence against the present defendants of any thing except the fact of its recovery; for if it was, we think it would be conclusive

evidence against them of every fact necessary to be found in order to recover such a judgment.

Bartsch was negotiating for a loan of money from the present plaintiff, to be secured by mortgage on certain real estate, and as an inducement to plaintiff to make the loan, agreed to erect and complete on the premises a certain building, the construction of which, it is fairly inferable from the language of the bond hereinafter described, had been already commenced; but as the real estate and building might be or might become holden and liable for liens and claims of mechanics and others, the plaintiff exacted of Bartsch a bond executed by himself as principal and the other defendants as sureties, conditioned that Bartsch should erect and complete the building within a specified time, and pay or cause to be paid all bills, claims, and demands of laborers, materialmen, and others for labor performed and materials furnished for such building, and used therein, which were then, or which might become, liens on said real estate or the building thereon, and "should keep and maintain the security or ⁴⁷⁷ mortgage (to the plaintiff) the first and paramount lien on said real estate, building, and improvements thereon," and pay and reimburse the plaintiff for all moneys paid out in said matter or by reason of said claims, liens, etc., and reimburse it for all expenses incurred, moneys paid out, and for all time, trouble, and work in and about said matters performed by any of its officers, agents, or employees. Thereupon the plaintiff made the loan secured by mortgage and recorded June 2, 1890, and Bartsch proceeded with the construction of the building. Subsequently the Minneapolis Glass Company commenced an action against Bartsch and the present plaintiff to enforce a lien upon the premises for glass alleged to have been furnished to Bartsch in September and October, 1890, for the construction of the building.

The relief sought in that action was for personal judgment against Bartsch, and that such judgment be declared a lien on his interest in the premises, and that such lien be adjudged paramount and prior to the lien of the present plaintiff's mortgage. Neither Bartsch nor the present plaintiff appeared or answered in that action, which resulted in a judgment on default, in accordance with the allegations and prayer of the complaint. These sureties had no notice of that action, nor, so far as appears, did the present plaintiff ever request Bartsch to defend the action in its behalf. Plaintiff

having paid the amount of the judgment in favor of the glass company, brought this action on the bond, and as evidence of a breach of its condition, introduced merely the record in the other action. There is perhaps no subject upon which the courts are more at sea than the law in relation to the effect of a judgment against a principal for the purpose of charging a surety.

Of course every one is familiar with the rule that as against any one except the parties and their privies, a judgment is evidence only of the fact of its recovery. What are sometimes called exceptions to this rule are not exceptions, but do not fall within the rule at all, depending solely upon the principle that one may contract to be answerable to another upon such lawful conditions as he pleases. Hence, if a surety stipulates for any particular method by which the liability of his principal or of himself shall be fixed, he is bound by ⁴⁷⁸ it. If he has undertaken, either expressly or by implication from the position which he has assumed with reference to pending litigation, to be responsible for the result of a suit between others, to which he is not a party, and to which he has not been made privy by notice and an opportunity to defend, then in the absence of fraud and collusion, the judgment against the principal alone would be conclusive evidence against him of every fact which it was necessary to find to recover such a judgment. This would be because he had so contracted. In the absence of such agreement, express or implied, it would be as to him *res acta inter alios*, and evidence of nothing except the fact of its recovery. There would seem to be no middle ground, and it is consequently very difficult to sustain on principle that numerous class of cases which hold certain judgments against the principal *prima facie*, but not conclusive evidence that the facts *in pais* against which the surety agreed to indemnify were established in the suit.

In every case the important question is: What are the terms of the surety's contract? What has he undertaken to indemnify his covenantee against? On what contingency has he agreed that his liability shall be fixed? But we have no occasion to go into any extended discussion on this subject, for the reason that we are satisfied that under the facts the determination in the other suit that the glass company's lien was prior to that of plaintiff's mortgage, is not *res adjudicata*, even as to Bartsch. If it is, it must be by virtue of the covenant in the bond to the effect that Bartsch should keep and

maintain plaintiff's mortgage the first and paramount lien on the premises. It seems plain to us, in view of the general purpose of the bond, as well as of its other provisions, that this must be construed as being a mere general contract of indemnity against paramount liens, and not an undertaking to be bound by the result of any actions brought against plaintiff by third parties claiming paramount liens, or to assume the defense of such actions in the absence of any request by plaintiff for him to do so. Hence, if Bartsch has not created any paramount lien, there has been no breach of the condition of the bond. The mere fact that Bartsch was a party defendant ⁴⁷⁹ in that suit does not render the determination of that issue between the glass company and the present plaintiff *res adjudicata* as to him.

It is well settled that parties to a judgment are not bound by it in a subsequent controversy between each other, unless they were adversary parties in the original action: Freeman on Judgments, sec. 158. Now while the present plaintiff and Bartsch were made defendants in the other suit, they were not adversary parties, and there were no issues between them that could have been tried in that action. The issue tendered to Bartsch by the complaint was that he owed the glass company a certain amount, and that it was a lien on his interest in the premises. The additional issue tendered to the present plaintiff was that this lien was prior to the lien of the mortgage. Bartsch might have had no defense, and yet on the issue of priority of liens the present plaintiffs have had a perfect defense. Bartsch had no issue with either the glass company or the present plaintiff as to which was the prior lien. That issue was entirely between it and the glass company. Neither had Bartsch any right, in the absence of a request on part of the present plaintiff, to assume the control of its defense to the action. It is unquestionably true that, as between the glass company and the present plaintiff, the judgment is conclusive that the lien of the former is prior to the mortgage of the latter; but that was not in controversy between plaintiff and Bartsch. If plaintiff had desired to make the judgment as to that matter binding on Bartsch, it should have notified him to assume the defense of the action in its behalf. This it would have had a right to do by reason of his contract of indemnity against paramount encumbrances. If he had declined to do so, the judgment would have been conclusive against him. Whether it would have been conclu-

sive on his securities without notice to them also we need not inquire.

Our conclusion is that in this or any other subsequent controversy between plaintiff and Bartsch, whether on this bond of indemnity or upon covenants of title in the mortgage, as to whether the lien of the glass company was prior to that of plaintiff, the judgment in the former action is not only not conclusive, but is not evidence at all; and, if not against Bartsch, of course not against these respondents, ⁴⁸⁰ his sureties. This renders it unnecessary to consider any other points in the case.

Order affirmed.

SURETYSHIP—JUDGMENT AGAINST PRINCIPAL WHEN NOT EVIDENCE AGAINST SURETIES.—In the absence of notice and opportunity to defend, a judgment against a principal is not conclusive against his sureties, but is evidence only of its own existence: *Grommes v. St. Paul Trust Co.*, 147 Ill. 634; 37 Am. St. Rep. 248, and note with the cases collected.

WARD v. JOHNSON.

[51 MINNESOTA, 480.]

NEGOTIABLE INSTRUMENTS—FRAUD IN INCEPTION OF NOTE NO DEFENSE IN ACTION BY INDORSEER, WHEN.—One who voluntarily signs an instrument which he knows to be a promissory note of some kind, relying wholly upon the statements of the party opposed to him in the contract as to its nature, and without informing himself of its contents, is guilty of such negligence as will preclude him from availing himself, in action on the note by a *bona fide* indorsee for value, of the defense that his signature was obtained by false and fraudulent representations as to the character of the obligation.

H. Steenerson and A. R. Holston, for the appellant.

Jenkins and Treat, for the respondent.

⁴⁸¹ MITCHELL, J. This action was brought against defendant, as maker of a negotiable promissory note, the plaintiff being a *bona fide* indorsee before maturity for a valuable consideration.

The defense was that defendant's signature was obtained by fraudulent ⁴⁸² representations as to the nature and terms of the contract, the attempt being to bring the case within the provisions of Laws of 1883, chapter 114.

A jury trial was waived, and the court found that defend-

ant's signature was obtained by false representations, but that he was guilty of negligence in making and delivering the note.

The only question in the case is whether this finding was justified by the evidence, for according to the provisions of the statute, as well as according to the doctrine of all the cases in the absence of any statute, negligence by the maker in affixing his signature to a note or bill, in ignorance of its character will deprive him of this defense as against an innocent indorsee for value before maturity. The evidence in this case was ample to justify, if not require, the finding that was made. He signed the note voluntarily, without informing himself of its contents, relying wholly upon the statements of the party opposed to him in the contract as to its nature and contents. He did not have even the stereotyped excuse that he could not read the instrument. He knew he was signing a promissory note of some kind, and yet affixed his name to it without availing himself of the means of information immediately within his power. It is difficult to conceive of a plainer case of negligence than this.

Judgment affirmed.

NEGOTIABLE INSTRUMENTS—FRAUD IN INCEPTION AS AFFECTING BONA FIDE HOLDER.—This question is thoroughly treated in the monographic note to *Bedell v. Herring*, 11 Am.St. Rep. 309. And in the extended note to *Willard v. Nelson*, 37 Am. St. Rep. 458, where the later cases will be found collected.

HANSON v. BEAN.

[51 MINNESOTA, 546.]

FRAUDULENT CONVEYANCES.—AN INTENTION TO DEFRAUD EXISTING CREDITORS may be inferred where a debtor, in embarrassed circumstances, executes a mortgage, which secures an amount largely in excess of the sum actually due to the mortgagee, and is not given to cover future advances.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS, WHAT ARE NOT.

A conversation between a mortgagor and a mortgagee in the presence of the attorney employed to draft the mortgage is not a privileged communication, where the statements then overheard were not made for the purpose of obtaining professional advice, and have not served as the basis of any counsel given by the attorney.

FRAUDULENT CONVEYANCES—RELATIONSHIP OF PARTIES, EVIDENCE OF FRAUD.—The fact that there is a family relationship between the parties to a mortgage is material in determining whether it is fraudulent as to existing creditors, and, where that question arises, the jury are properly instructed that preferences claimed by way of mortgage, under such circumstances, should be carefully scrutinized.

Merrick and Merrick, for the appellant.

Grethen and McHugh, and Peterson and Kollner, for the respondent.

⁵⁴⁷ VANDERBURGH, J. The defendant, as sheriff, by virtue of an execution issued out of the district court of Hennepin county in favor of Peter Foss, execution creditor, levied upon certain personal property of one Ellison. The plaintiff, claiming title under a chattel mortgage executed to him by Ellison, brought this action of replevin in the district court of Ramsey county to recover the possession of the property. The jury found for the defendant.

1. We are first to inquire whether the trial court erred in refusing a new trial because the verdict was not justified by the evidence. ⁵⁴⁸ The chief question on this branch of the case is whether the mortgage under which plaintiff claims is fraudulent as against creditors, including Foss.

An examination of the evidence fully satisfies us that the verdict is justified by the evidence in the case, which tends to show that the mortgage was given to plaintiff, who is the father-in-law of the mortgagor, judgment debtor, to shield the property from the attacks of creditors. Only a short time before Ellison's debt to Foss became due he executed the mortgage in question to Hanson for sixteen hundred dollars, which there is evidence tending to show was largely in excess of any amount actually due plaintiff. This alone would be a badge of fraud, it not appearing to be for future advances. But upon the evidence of the witnesses, the question was fairly for the jury to determine whether the mortgage was not made with the intention of defrauding or hindering the defendant in the collection of his debt. We have examined the evidence in the case as to the actual amount of Ellison's indebtedness, and the purpose for which the mortgage was executed, and have no doubt that this question was properly for the jury.

2. An attorney who was employed to prepare the mortgage was permitted to testify, over the plaintiff's objection, to a conversation which he heard at that time between plaintiff and Ellison in respect to the amount of the latter's indebtedness to plaintiff. The evidence was properly received. It was clearly not privileged, because made in his hearing. It was not a communication made to him as an attorney, nor does it appear to have been the basis of any legal counsel or

advice given by him, nor were the statements made for the purpose of obtaining his advice or legal opinion. It did not, therefore, come within the rule in respect to privileged communications: Gen. Stats. 1878, c. 73, sec. 10; *House v. House*, 61 Mich. 69; 1 Am. St. Rep. 570; *Caldwell v. Davis*, 10 Col. 481; 3 Am. St. Rep. 599; 1 Greenleaf on Evidence, secs. 239, 240.

3. Foss recovered the judgment in question in the municipal court of the city of Minneapolis. A transcript was filed in the district court of Hennepin county, from which last court execution was thereupon issued, under which the levy in question here was made.

549 The plaintiff's contention is that it was necessary that execution should first issue out of the municipal court, but we are of the opinion that the statute relating to judgments of justices of the peace is not applicable in that respect in this case, and that the judgment creditor's procedure was strictly within the terms of the municipal act. Its express provisions exclude the interpretation insisted on by plaintiff's counsel. Upon the filing of the transcript of a judgment of the municipal court, the judgment passes "under the exclusive control of the district court, and is carried into execution by its process, as if rendered in said district court": Special Laws 1889, c. 84, sec. 15.

4. The exceptions to the charge cannot be sustained. The attention of the jury was properly called to the fact that the parties to the mortgage were related, and to their dealings and conduct, and it was proper to state to the jury that preferences claimed by way of mortgage, under such circumstances, should be carefully scrutinized.

Plaintiff also excepted to the instructions as to the effect of including in a mortgage an excess over the amount actually due or advanced, but they were clearly correct, and related to an intentional false and fraudulent representation of the amount of the debt secured.

5. The verdict was sufficient in form to warrant the judgment authorized by 1878 General Statutes, chapter 66, section 272. The jury found for the defendant, and assessed the value of defendant's special property or interest in the property levied on, which was the amount of the execution and costs. This was the proper assessment of value to make in such a case.

Order affirmed.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS—WHAT ARE NOT. A privileged communication must be made for the purpose of obtaining legal advice upon the client's interests. A conversation between two persons in the presence of an attorney employed by them to draw a paper in connection with the subject of the conversation is not privileged: *House v. House*, 61 Mich. 69; 1 Am. St. Rep. 570, and note; *Goodwin Gas Store etc. Co's Appeal*, 117 Pa. St. 514; 2 Am. St. Rep. 696; *Cady v. Walker*, 62 Mich. 157; 4 Am. St. Rep. 834. See the note to *Blount v. Kimpton*, 31 Am. St. Rep. 555.

FRAUDULENT CONVEYANCES—RELATIONSHIP OF PARTIES—EVIDENCE OF FRAUD.—The relationship between an insolvent debtor and a preferred creditor is a fact to be considered by the jury on the question of intent to defraud creditors: *Van Raalte v. Harrington*, 101 Mo. 602; 20 Am. St. Rep. 626. Where a conveyance is made to a near relative, the fact is calculated to arouse suspicion, and the transaction should be closely scrutinized, though the fact is not of itself sufficient to raise a presumption of fraud: *Bierne v. Ray*, 37 W. Va. 571. The mere fact of relationship between the parties to a transfer cannot be resorted to as a badge of fraud where the conduct of the party receiving the transfer is consistent with fairness and honesty: *Gray v. Galpin*, 98 Cal. 633, but if such a transfer is secret and known to no one but the parties it is regarded as fraudulent: *Helms v. Green*, 105 N. C. 251; 18 Am. St. Rep. 893. See further the notes to *Fisher v. Bishop*, 2 Am. St. Rep. 361, and *Driggs etc. Bank v. Norwood*, 7 Am. St. Rep. 83.

FRAUDULENT CONVEYANCES—CONVEYANCE TO CREDITOR OF PROPERTY LARGELY IN EXCESS OF DEBT.—If a creditor takes and ties up property of his debtor greatly in excess of security for his debt he is chargeable with fraudulent intent, and the property in his hands will be subject to the claims of other creditors: *Smith v. Boyer*, 29 Neb. 76; 26 Am. St. Rep. 373, and note. See also *Snyder v. Partridge*, 138 Ill. 173; 32 Am. St. Rep. 130, and note.

ROLLINS v. MITCHELL.

[52 MINNESOTA, 4L.]

HUSBAND AND WIFE—WIFE'S DEFECTIVE DEED NOT CURED BY HUSBAND'S SUBSEQUENT DEED, WHEN.—A married woman's deed, defective for the reason that her husband did not join therein, is not validated by a subsequent deed executed by the husband alone.

TRUSTS—TRUSTEE EX MALEFICIO, WHO IS.—One who obtains a conveyance of land from a former owner by fraudulently giving him to understand that it is for the purpose of supporting an earlier defective conveyance, and thus validating the title of one who claims thereunder, may be charged by the latter as a trustee *ex maleficio*. In such a case the rights of the *cestui que trust* do not depend upon the existence of a fiduciary relation in regard to the title between him and the fraudulent grantee, nor upon the fact that he has some legal claim to the land which he could have enforced against the original owner thereof.

W. W. Billson, for the appellants.

Edward Fuller, and Davis, Kellogg, and Severance, for the respondents.

⁴⁴ MITCHELL, J. This was an action to determine an adverse claim of defendants to certain real estate. The defendants set up by way of counterclaim, as well as defense, facts from which they claimed that plaintiff held the title as trustee *ex maleficio* for defendant Mitchell. Marvin, the intervener, purchased from the plaintiff during the pendency of the action. This appeal is from a judgment in favor of the plaintiff and the intervener.

Although we have concluded that the case is controlled by the weight of the evidence upon a single issue of fact, yet, in order to fully understand the testimony, it is necessary to state briefly the history of events leading up to the particular transaction involved in that issue.

In 1872 a Mrs. Gabiou, or Wright, then a married woman, and the owner of the land in controversy, sold it to one Bardon, and executed to him her sole deed, and, presumably for the purpose of validating this deed, her husband shortly afterwards executed to Bardon ⁴⁵ another deed, in which, however, his wife did not join. Subsequently Bardon conveyed to one Howard, who conveyed to defendant Burt, who in turn conveyed to defendant Mitchell, all by warranty deed. In November, 1891, one Nichols applied to one Loudon, Mitchell's agent, to purchase the land, and took from him a written contract of sale, and paid one thousand dollars as earnest money. Although not material, under the view we take of the case, it may be stated that this contract was not binding on Mitchell, because Loudon had no written authority to execute it. Pursuant to the terms of this agreement Loudon furnished Nichols an abstract of title, from an examination of which the latter discovered that Mitchell's title was invalid, for the reason that Mrs. Gabiou's husband had not joined in her deed to Bardon, a defect which was not cured by the subsequent deed of the husband, in which the wife did not join. Thereupon Nichols notified Loudon of the defect in the title, and that for that reason he refused to complete the purchase, and demanded back his one thousand dollars. Almost immediately thereafter Nichols went to Bardon, and obtained from him Mrs. Gabiou's address, which was at a small village in Michigan, several miles out from Detroit, to which she had removed on leaving this state. There is a conflict of testimony between Nichols and Bardon as to the representations by the former as to the purpose for which he wanted this woman's address, but neither do we consider this material.

After getting Mrs. Gabiou's address, and assuring himself, by wiring to a party in Detroit, that she was still there, Nichols, without informing Mitchell or his agent of his intention, immediately started for Detroit, and, on arriving there, in company with a notary named Race, and one Summerville, who had just previously ascertained for him Mrs. Gabiou's exact whereabouts, drove out to her residence, with a draft of a deed already prepared, and procured her execution of it for the nominal consideration of one dollar, and a few days afterwards sold the land to the intervener for ten thousand dollars. Nichols took the deed in the name of the plaintiff, Rollins, who resided in Chicago, but it is quite apparent that the latter was a mere figurehead. At least it was admitted on the trial that Nichols, in all he did, represented the plaintiff, and that the latter stood in no ⁴⁶ better position than Nichols would, had he been acting for himself. Hence we shall hereafter treat Nichols as if he were the plaintiff, and the principal in the transaction.

With this preliminary statement explaining the situation of the parties, and their relation to the property and to each other, we come to the consideration of the evidence as to what occurred at this interview at which Nichols secured this deed from Mrs. Gabiou; the question which we consider as controlling the case being whether this evidence was such as to require a finding that Nichols secured this deed by giving Mrs. Gabiou to understand that it was in support of her original conveyance to Bardon. If he did, it is clear, on well-settled equitable principles, that he is chargeable as trustee *ex maleficio* for those claiming under Bardon. No one else being present (Mrs. Gabiou apparently living alone), the only direct evidence as to what occurred on the occasion referred to is the testimony of Mrs. Gabiou, Nichols, and his two companions, Summerville and Race. Mrs. Gabiou's testimony is positive to the effect that Nichols told her that he had bought the land of Bardon, and that he wanted the deed, because he was about to sell it again. But, as the finding of the court cannot be disturbed if there is a fair conflict of evidence, we must look to the testimony of Nichols, Summerville, and Race. Mrs. Gabiou, who was about fifty-eight years old, was an illiterate woman, unable even to write her name. Nichols and his two companions were all entire strangers to her, with whom she had had no previous dealings, and who had no claim whatever upon her generosity. Nichols denies that he told

•

her that he had bought the land of Bardon, or that he wanted the deed to fix up the Bardon title, but says that he told her that her deed to Bardon was void, and that he (Nichols) wanted to buy her interest in the land, his position being that he bought the land of her as an original purchaser. But both he and his companions all admit that when they went into the house he opened the conversation on the subject by calling her attention to her having sold the land to Bardon, thus placing that fact, and not her ownership of the land, in the foreground, as the basis of the interview. Again, Nichols admits that he told her that Bardon had given him her address. It is clear that the impression which these statements ⁴⁷ would naturally produce on the mind of such a woman would be that Bardon (whose friend she had been since his childhood) had sent Nichols for a second deed, or at least that he desired her to execute one.

Indeed, it is difficult to imagine any other object in Nichols making the second of these statements, except to convey this very impression to her mind. She would not be likely to suppose that Bardon had furnished Nichols her address for the purpose of enabling him to buy the land out from under him or his grantees. Again, Race's testimony, which is not controverted, is that Nichols told her that her deed to Bardon was invalid, and that he had come to get a new conveyance.

This is the natural language of one whose object is to cure a defective title, and not of one negotiating for the purchase of property upon which he has no claim. But, further, in every negotiation for the purchase of property, the questions which always come up at the very outset are as to its character and value, what the owner will take for it, and what the proposed purchaser is willing to give. Yet, according to all the witnesses, there was not even a passing allusion to any of these subjects during the entire interview. Apparently not even the one dollar named in the deed as the consideration was mentioned until after it was delivered, when Nichols after being unable to find a dollar in change among his companions, handed Mrs. Gabiou a five-dollar bill, remarking that the consideration of the deed was one dollar, and that he made her a present of the balance. Now, although as suggested by plaintiff's counsel, she may not have entertained a very high idea of the country in which this land is situated, it is utterly inconceivable that this woman should, without a word as to value or quality, have given away to an entire

•

stranger both to her and to the title, one hundred and sixty acres of land, which she was told, according to plaintiff's witnesses, that she still owned. Apparently conscious of the gross improbability of such a thing, Nichols attempts to show a consideration for the deed in addition to the one dollar. It appears that during the interview Mrs. Gabiou mentioned that her deceased husband had once owned another tract of land in the same vicinity, and that when she left the country some twenty years before it had been left in charge of a relative, but that she had never heard ⁴⁸ of it since, and did not know what had become of it, or whether it had been sold; and that Nichols told her he was frequently up in that county, and that he would "look it up." He testified that they had "what did seem to him then and does now," a verbal agreement that he was to perform certain services in connection with "looking up" this other land, and this, it is now claimed, was the consideration for the deed. This claim is too transparent to be entitled to serious notice. The idea that even this illiterate woman would give away a tract of land, which she was assured she did own, in consideration of some sort of an indefinite promise by a stranger to "look up" another tract which she did not know whether she owned or not, is too preposterous for belief. It is perfectly apparent from the evidence, as Race was compelled to admit, that the talk about looking up the other land was a mere desultory conversation, and was not understood by any one as entering into the consideration for the deed; that at most it was merely a matter that might or might not be made the subject of future deals between them; and, without going into details, it is perfectly evident from Nichols' subsequent conduct, that this was all there was of it.

It may be said that the fact that Mrs. Gabiou presumably knew that the deed did not run to Bardon tends to show that she did not execute it to validate or support the Bardon title. But in this connection two significant facts should be noticed. 1. Nichols told her that Bardon had sold the land; and 2. Although he says he did not tell her that he had bought from Bardon, yet he did not tell her that he had not done so. It is also to be noticed that it nowhere appears that even after she was informed of the invalidity of her original deed to Bardon, did Mrs. Gabiou assert any claim or right to the land, unless such claim is implied in the mere act of executing this second deed. On the contrary, all her remarks on the

subject, so far as they go, are in the direction of a disclaimer of any interest in the land which she had sold and received her pay for, some eighteen years before, thus apparently recognizing a moral, although not legal, obligation not to assert any such claim. There are other features of the case that might be referred to if time permitted, but it is ⁴⁹ enough to say that, in our judgment, the entire evidence irresistibly compels the conclusion that Nichols secured the deed by giving Mrs. Gabiou to understand, or by conveying to her the impression, that it was in support of her original conveyance to Bardon, and to validate the Bardon title, and that she executed it under that impression, and supposing it would have that effect.

It is not necessary that Nichols should have expressly told her that he or the party for whom he was acting had purchased of Bardon, and that the deed was desired for the purpose of fixing up that title. It is enough to hold him chargeable as trustee if he by indirection gave her to understand, or by any means intentionally conveyed to her mind the impression, that such was the fact. A person may make a false representation or fraudulent promise by indirect as well as by direct statements, and even by keeping silence when he ought to speak: *Wallgrave v. Tebbs*, 2 Kay & J. 321; *O'Hara v. Dudley*, 95 N. Y. 403; 47 Am. Rep. 53. It is urged, however, that, although a fraud may have been committed on Mrs. Gabiou, none was committed on defendant Mitchell; that to charge Nichols, as trustee for Mitchell, either the former must have sustained some fiduciary relation to the latter in respect to the title, or the latter must have had some claim to the land in the hands of Mrs. Gabiou, which he could have enforced against her. We do not so understand the law. The rights of the third person in such cases depend, not upon the fact that he had some legal or equitable claim to the property before the constructive trust was created, but upon the fact that he acquired such right by the trust, as being the party for whose benefit it was intended by the former owner. The proposition is thus tersely put by Lord Eldon in *Mestaer v. Gillespie*, 11 Ves. 638, where, in referring to an earlier case, in which Lord Thurlow held a trust in favor of a volunteer, he says: "In this case, as in that, the party comes here saying he has neither a legal nor equitable title, but that he was prevented by the fraud of the defend-

ants from having a legal title, desiring the court, on account of that fraud, to make him a good legal title."

The most common illustration of the principle is to be found in that familiar class of cases where a party has procured a will or deed ⁵⁰ to be made in his favor under a fraudulent promise that the property would be received and applied to the benefit of a third person. In such cases the devisee or grantee is charged as trustee for such third person, notwithstanding that the former sustained no fiduciary relation towards the latter, and although the latter had no claim to the property which he could have enforced against the testator or grantor. Thus, it is said: "If a person, by his promises, or by any fraudulent conduct, with a view to his own profit, prevents a deed or will from being made in favor of a third person, and the property intended for such third person afterwards comes to him who fraudulently prevented the execution of the will or deed, he will be held to be a trustee for the person defrauded to the extent of the interest intended for him; . . . and where a person fraudulently intercepts a gift intended for another by promising to hand it over if it is left to him, equity will compel an execution of the promise by converting such person into a trustee": Perry on Trusts, sec. 181. Pomeroy states the doctrine as follows: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealment, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances, which render it unconscionable for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein": Pomeroy's Equity Jurisprudence, sec. 1053.

Within this general principle, if Nichols secured this deed by giving Mrs. Gabiou to understand that it was in support of her original conveyance to Bardon, then he is chargeable as trustee for Mitchell, who holds the Bardon title.

Marvin, the intervener, according to his own confession, bought with actual knowledge that the title was in litigation in this suit, and that Mitchell made some claim to the land adverse to the plaintiff. It is not important that he bought before defendants served their answer, and consequently may

not have known the particular grounds on which the claim was founded. He saw fit to buy without ⁵¹ inquiring of defendants as to the character or basis of their claim, and is chargeable with notice of all the facts which, presumably, such inquiry would have given him.

Judgment reversed, and new trial ordered.

TRUSTS EX MALEFICIO—WHEN ARISE.—A trust *ex maleficio* arises whenever a person acquires the legal title to property by means of an intentional, false, or fraudulent verbal promise to hold it for a certain specific purpose, as, for example, to convey it to another, or reconvey it to the grantor, and having thus obtained the title, retains and claims the property as his own: *Larmon v. Knight*, 140 Ill. 232; 33 Am. St. Rep. 229, and note with the cases collected.

HUSBAND AND WIFE—WIFE'S DEFECTIVE DEED—EFFECT OF SUBSEQUENT DEED.—A subsequent conveyance by the husband and wife, intended as a confirmation of the first, would have the effect of a new appointment by the wife, if the first deed were invalid: *Coryell v. Dutton*, 7 Pa. St. 530; 49 Am. Dec. 489. See the extended note to *King v. Rhess*, 23 Am. St. Rep. 82.

MOORE v. NORMAN.

[52 MINNESOTA, 88.]

TENDER WITH CONDITION ANNEXED NOT VALID.—When a larger sum than that tendered is in good faith claimed to be due, the tender is not effectual if it is coupled with such conditions that the acceptance of it, as made, will involve an admission by the creditor that no more is due.

MORTGAGE, LIEN OF, NOT DISCHARGED BY CONDITIONAL TENDER.—The maker of a note already past its maturity and still in the hands of the payee cannot insist upon its surrender as a condition precedent to the payment of a sum asserted by him to be the full amount of the balance due thereon, but alleged by the payee to be insufficient to liquidate the debt, and a tender thus qualified will not discharge the lien of a mortgage given to secure the note.

PAYMENT, WHAT DOES NOT CONSTITUTE.—A mere direction by the maker of a note to his agent to apply thereon money which he has received and holds as such agent does not constitute a legal application of the money by reason of the fact that the same person is also the general agent of the payee of the note, unless there is evidence that he consented, expressly or impliedly, as the agent of such payee, to apply the money as directed.

Thomas J. Knox, for the appellant.

George W. Wilson, for the respondent.

⁸⁵ **DICKINSON, J.** The defendant, to secure two promissory notes executed by him to the plaintiff, mortgaged certain personal property to her. She prosecutes this action to recover

possession of a part of the mortgaged property by virtue of her rights as such mortgagee. A former appeal in this action is reported in 43 Minn. 428; 19 Am. St. Rep. 247. The only issue to which reference is now necessary is as to whether certain payments and a tender of payment made by the defendant were sufficient and effectual to discharge the mortgages. The whole transaction on the part of the plaintiff was conducted by one George R. Moore, who was her general agent.

Long after the maturity of the notes the defendant made a tender of payment to the plaintiff, which on his part is claimed to have been sufficient in amount with payments which had been previously made, to complete the payment of the debt, and hence to discharge the mortgages: *Moore v. Norman*, 43 Minn. 428; 19 Am. St. Rep. 247. The plaintiff, however, then claimed that the amount tendered was not sufficient to pay the debt; and whether it was so or not was one of the issues in this case, in respect to which the plaintiff's contention that the amount was insufficient was supported by evidence which would have sustained a verdict in her favor. The evidence tended to show that the tender was accompanied by a demand that the notes be surrendered; that such surrender was refused, a larger sum being claimed to be due; but ^{so} that the plaintiff (by her agent, who held the notes) offered to receive the money tendered and indorse it on the notes, which offer the defendant refused to accept. The court, at the request of the defendant, charged the jury to the effect that, if the amount tendered was sufficient, the defendant had a right to demand the surrender of his notes. This constitutes one of the errors assigned. We think, as applied to the circumstances of this case, this instruction was erroneous.

It may be stated as a general proposition, applicable at least where it appears that a larger sum than that tendered is in good faith claimed to be due, that the tender is not effectual as such if it be coupled with such conditions that the acceptance of it, as tendered, will involve an admission by the party accepting it that no more is due: *Leake on Contracts*, 865, 866; *Addison on Contracts*, 9th ed., 153; 2 *Chitty on Contracts*, 1194; *Bowen v. Owen*, 11 Q. B. 130; *Finch v. Miller*, 5 Com. B. 428; *Evans v. Judkins*, 4 Camp. 156; *Foord v. Noll*, 2 Dowl., N. S., 617; *Thayer v. Brackett*, 12 Mass. 450; *Wood v. Hitchcock*, 20 Wend. 47; *Noyes v. Wyckoff*, 114 N. Y. 204; *Holton v. Brown*, 18 Vt. 224; 46 Am. Dec. 148. See, fur-

ther, in support of the general rule that a tender, to be effectual, must be absolute and unconditional, *Moore v. Norman*, 43 Minn. 428, 434; 19 Am. St. Rep. 247; *Bank of Benson v. Hove*, 45 Minn. 40, 42; *Balme v. Wambaugh*, 16 Minn. 116. The most common and familiar illustrations of the proposition above stated are cases where the tender is made as being all that is due, or as payment in full. It is everywhere held that such a tender is not good. The debtor has no right to the benefit of a tender, as having the effect of a payment, when it is burdened with such a condition that the creditor cannot accept the money without compromising his legal right to recover the further sum which he claims to be due. This case falls within the same principle. By offering to pay the money only upon the condition that the plaintiff deliver up the notes (if such was the fact), the defendant insisted upon a condition the acceptance of which would at least seriously compromise the right of the plaintiff to recover any more, even though it should be true that the amount unpaid exceeded the sum tendered. The acceptance of the money and ⁸⁷ the surrender of the notes would be at least strong evidence against her in the nature of an admission that the notes were thereby fully paid. The defendant should not be heard to assert that a mere offer to pay a specified sum, less than was supposed by the other party to be due, has the effect of a payment, so as to discharge the mortgage, when the offer was burdened with such a condition. It was enough for his protection that the plaintiff would have received the money offered and have indorsed its payment on the notes which were already overdue and still in the hands of the plaintiff. If the defendant rejected this offer, and insisted upon the surrender of the notes, the natural and only reasonable construction to be put upon his conduct was that he insisted that the tender, if accepted, should be accepted as payment of the notes in full. If that was the effect of the tender it was bad under all the authorities. A mere tender should not be effectual to discharge the lien of a mortgage unless it be certainly sufficient in amount and unburdened with any conditions which the debtor has not a clear right to impose: See *Moore v. Norman*, 43 Minn. 428; 19 Am. St. Rep. 247, and *Bank of Benson v. Hove*, 45 Minn. 40. A new trial must be granted for the reason above stated.

We will refer to another matter by way of caution.

While George R. Moore was the general agent of the plaintiff there was evidence tending to show (although this is a

matter of controversy) that on a certain occasion, when some property of the defendant was sold, he acted as an agent of the defendant, and as such agent received the proceeds of the sale. If such was the fact, a mere direction by the defendant to him to apply on the plaintiff's notes the money which he (Moore) had received and held as the agent of the defendant would not, in itself, constitute, or be legally equivalent to, such an application of the money. If the defendant's agent disobeyed such instructions and applied the money to his own use, the plaintiff would not be affected thereby, unless the circumstances were such that it could be considered that in behalf of the plaintiff, as her agent, he consented to apply the money as a payment on her notes. Such consent need not be express. If the defendant engaged Moore to be present at the sale, to receive the proceeds of sales made, and to apply the same on the plaintiff's ^{ss} notes, it might be inferred, in the absence of any dissent by Moore, that he acquiesced in this, and hence that when he received the money he received it as the agent of the plaintiff, even though, for some other purposes connected with the sale, he might have acted as the agent of the defendant. Of course, if the money was received by him as her agent, it was as though it had been received by her personally.

Order reversed.

TENDER, CONDITIONAL.—A tender with a condition annexed is invalid; *Holton v. Brown*, 18 Vt. 224; 46 Am. Dec. 148, and note; *Brooklyn Bank v. De Grauw*, 23 Wend. 342; 35 Am. Dec. 569, and note; *Henderson v. Cass County*, 107 Mo. 50. A tender made subject to the condition that if the amount offered is accepted, it will be in full payment of all claims, is invalid; *Draper v. Hitt*, 43 Vt. 439; 5 Am. Rep. 292; *Butler v. Hinckley*, 17 Col. 523; *Henderson v. Cass County*, 107 Mo. 50. See, further, the extended note to *Moynahan v. Moore*, 77 Am. Dec. 476.

TENDER MUST BE FOR FULL AMOUNT.—An offer of part of the amount due does not avail as a tender, nor if refused does it operate as payment *pro tanto*: *Fridge v. State*, 3 Gill & J. 103; 20 Am. Dec. 463; *McDaniels v. Bank*, 29 Vt. 230; 70 Am. Dec. 406. An offer of a sufficient sum in settlement of one claim is not a tender when made conditional, upon the acceptance of an offer of an insufficient sum in settlement of another claim, the whole sum offered not being sufficient to cover both claims: *Shuck v. Chicago etc. Ry. Co.*, 73 Iowa, 333. See *Moore v. Norman*, 43 Minn. 428; 19 Am. St. Rep. 247, and note.

SEIBERT v. MINNEAPOLIS AND ST. LOUIS RY. CO.

[52 MINNESOTA, 148.]

PLEADING—DEMURRER TAKEN TO PART OF COMPLAINT ONLY, WHEN GOOD.

One who intervenes in a suit in which there are several defendants, and in separate portions of his complaint sets out the facts upon which his claim for relief against each of them is based, cannot object that a demurrer by one of those defendants is bad because taken to a portion of the complaint only, when the portion to which it is directed embraces a statement of all the facts upon which the intervener founds his claim for relief against that particular defendant.

CONTRACT TO INSTITUTE FORECLOSURE PROCEEDINGS ONLY IN A CERTAIN

MANNER NOT INVALID, WHEN.—A provision in a trust deed executed by a railway company to secure an issue of bonds, by which it is stipulated that individual bondholders are to be debarred from foreclosure proceedings until the trustee has been requested by a reasonable proportion of the bondholders to institute such proceedings, and has refused to comply with that request, is valid and obligatory. Such a stipulation does not divest the bondholders of their right to judicial remedies, but merely imposes certain conditions upon them in respect to the exercise of that right.

INTERVENTION IN FORECLOSURE PROCEEDINGS, WHO MAY OBJECT TO.—

The trustee in a trust deed executed by a railway company to secure an issue of bonds, and providing that foreclosure proceedings by the individual bondholders are not to be resorted to until the trustee has refused to comply with the request of a certain number of the bondholders to institute such proceedings, is entitled to resist the application of individual bondholders to be allowed, contrary to that provision, to intervene in a foreclosure suit already instituted by himself.

Cook and Dodge, and Akers and Lancaster, for the appellant.

Butler, Stillman, and Hubbard, and Warner, Richardson, and Lawrence, for the respondent, Central Trust Company of New York.

Woods and Kingman, and Keith, Evans, Thompson, and Fairchild, for the Fidelity Insurance Trust and Safe Deposit Company.

Truesdale and Pierce, for the Farmers' Loan and Trust Company.

152 VANDERBURGH, J. This suit is brought to foreclose a certain mortgage executed by defendant railway company to the Central Trust Company, which trust company has been superseded by the appointment of the plaintiff, Henry Seibert, as trustee in its place. The defendants Farmers' Loan and Trust Company and Central Trust Company are named as trustees in other mortgages executed by the railway company.

The intervener, F. H. Griggs, is the owner of bonds secured by the mortgages executed to the last-named trustees in trust to secure the bondholders holding bonds issued thereunder. In the first three paragraphs of the complaint in intervention reference is made to its bonds secured by the mortgage held by the Farmers' Loan and Trust Company as trustee, and therein is set forth the facts upon which the intervener bases his claim for relief, by way of the foreclosure of that mortgage, on his application, and for the benefit of himself and other bondholders. The remainder of his complaint presents the facts upon which he bases a similar claim in respect to his bonds secured by other mortgages executed to the Central Trust Company.

1. The defendant Farmers' Loan and Trust Company demurs to that portion of the intervener's complaint included in the three paragraphs referred to as containing the plaintiff's cause of action against it. As this portion of the complaint embraces a statement of all the facts upon which the intervener claims relief against it, we think that the objection that the demurrer is bad because taken to a part of the complaint only is not well taken. The court can determine from the issue thus made whether or not the intervener is entitled to any relief against the defendant upon the facts stated.

The intervener alleges: "That in the mortgage or deed of trust executed by the Minneapolis and St. Louis Railway Company to the Farmers' Loan and Trust Company, bearing date the first day of February, 1877, and securing the twenty-one bonds, and the coupons therefrom, held and owned by intervener, as particularly described in the first division of this intervener's complaint, it is provided, among other things, in article 6 thereof, as follows: 'In case default shall be made in the payment of any of the said coupons, or semi-annual interest upon any of the aforesaid bonds, at the time and ¹⁵³ in the manner in the coupons issued therewith, provided the said coupon has been presented, and the payment of the interest therein specified has been demanded, and, in case such default shall continue for the period of four months after the said coupons shall have become due and payable, then and thereupon the principal of all the bonds secured hereby shall become immediately due and payable, any thing contained in the said bonds to the contrary notwithstanding.' "

Intervener avers that all of his said described coupons from the bonds in this division referred to have been presented for payment at the agency of the said Minneapolis and St. Louis Railway Company in the city of New York, and the payment of the interest therein specified has been demanded, and payment was refused; and all the said coupons have also been presented for payment to the acting treasurer of said Minneapolis and St. Louis Railway Company, at the city of Minneapolis, Minnesota, and the payment of the interest specified was demanded, and payment was refused, and default has been made in the payment of all the described coupons from said bonds. He also alleges that, excepting as to the several coupons aforesaid which became due and payable on the first day of December, 1891, such default as to the payment of all said coupons has continued for the period of more than four months from the several dates when they severally became due and payable; wherefore intervener avers that the principal of all the bonds secured by said mortgage or deed of trust in the division referred to has become due and payable and all the bonds secured by the said mortgage are now due and payable; that by article 9 of said mortgage it is provided—

“That it shall be the duty of the trustee, upon proper indemnification against costs and expenses, to execute the power of entry or the power of sale by said mortgage granted, or both, to take appropriate proceedings in equity or at law to enforce the rights of the bondholders, in case of any default made by the mortgagee, upon requisition in writing as hereinafter specified, viz:

“1. If the default be as to either the interest or the principal of any of the bonds aforesaid, such requisition upon the said trustee shall be by holders of not less than twenty-five per centum of the ¹⁵⁴ said bonds then outstanding; and upon such requisition and indemnification it shall be the duty of the trustee to enforce the rights of the bondholders under these presents by entry, sale, or legal proceedings, as it, being advised by counsel learned in the law, shall deem most expedient for the interest of all the holders of the said bonds.

“2. But it is expressly understood that such duty of the trustee shall be at all times subject to the power hereby declared of a majority in interest of the holders of the said bonds by requisition in writing, signed by such majority to instruct,

the said trustee to waive such default; provided, however, that no action of the bondholders in waiving such default shall extend or be taken to affect any subsequent default, or to impair the results arising therefrom.

“And it is hereby further expressly agreed and made binding upon each and every holder of bonds secured hereby that no proceedings at law or in equity shall be taken by any bondholder to foreclose the equity of redemption under this instrument, or to procure a sale of the property covered thereby, independently of the party of the second part, trustee, or its successors in said trust, except after a requisition shall have been made to the said trustee in the manner and form as hereinbefore provided, and also until after a refusal of the said trustee to comply with such requisition according to the provisions herein made in respect thereto.

Intervener submits and claims that the said provisions of article 9 of said last-described mortgage are void, in so far as they attempt to deprive the holder of any of the bonds which may have become due by default in payment of the interest coupons, or the holders of any of the past-due coupons, from enforcing the remedy whereby he might have his lien established upon the mortgaged property without the requisition of the holders of not less than twenty-five per centum of the said bonds then outstanding; that said provisions are in fact an attempt to oust the jurisdiction of any court to entertain a complaint by, or give relief to, the holders of less than twenty-five per centum of the outstanding bonds.

The principal question involved in this appeal, therefore, is whether the provisions of article 9 above quoted, restraining proceedings ¹⁵⁵ for foreclosure on the part of individual bondholders until after the requisition made upon the trustees by a certain proportion of the bondholders as therein provided, and a refusal by him to comply therewith, is valid and obligatory upon the individual bondholders as respects the enforcement of the security.

We are unable to see why the bondholders, subject to reasonable limitations, may not be bound by stipulations in the mortgage of this character, waiving a default, and providing, subject to the conditions named, for the foreclosure by the trustee exclusively. The interests of the bondholders as a class and the nature of the security are to be considered. “They are agreements which the bondholders are at liberty to make, and there is nothing illegal or contrary to public

policy in them": *Chicago etc. R. R. Co. v. Fosdick*, 106 U. S. 47, 77. Each bondholder enters into contract relations with each and all of his co-bondholders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose is modified not only by the express provisions of the mortgage, but by the peculiar nature of the security: *Gates v. Boston etc. R. R. Co.*, 53 Conn. 346; *Shaw v. Railroad Co.*, 100 U. S. 605, 612; *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 534-537; *Guilford v. Minneapolis etc. Ry. Co.*, 48 Minn. 560; 31 Am. St. Rep. 694. The legislature would have had an undoubted right to have incorporated, in the enabling statute authorizing the execution of the mortgage and the issuance of the bonds secured thereby, a provision requiring the mortgage to contain similar stipulations: *Howell v. Western R. R. Co.*, 94 U. S. 463-466.

It is clear, then, that it would be competent for the bondholders themselves to agree to them. They are to be treated as *stricti juris*, but nevertheless are to be reasonably construed in view of the nature of the mortgage, which is the common security for all the bondholders, and the purposes to be subserved in making them. There is no doubt that the parties could lawfully provide in the same instrument for a reasonable extension of the time for the commencement of foreclosure proceedings, to be determined at the option of a majority of the bondholders: *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray, ¹⁵⁶ 174. But the waiver of the default provided for in this instance amounts substantially to the same thing. So the mortgage might have been so drawn as to permit foreclosure proceedings to be instituted only after default in the payment of the principal debt or some part of it. The stipulation for the waiver of the default in the payment of interest is in principle no different.

Again, the trustee, as mortgagee, representing the interests of all the bondholders as beneficiaries, is the proper party to institute foreclosure proceedings, but, if he unreasonably neglects or refuses to discharge his duty in the premises, doubtless any bondholder may bring an action to enforce the security for the common benefit: *Chicago etc. R. R. Co. v. Fosdick*, 106 U. S. 68. Why may not the mortgage in the common interest stipulate the conditions under which this right may be exercised by the bondholders, and, in order to avoid the risk of rash or arbitrary proceedings, which might result in great injury to the security, provide that no such proceed-

ings should be instituted by an individual bondholder, except upon the refusal of the trustee to obey the requisition of a reasonable number of the bondholders? It is not the intention or effect of such conditions or stipulations to divest the bondholders of their right to judicial remedies, or to oust the courts of their jurisdiction; it is merely the imposition of certain conditions upon themselves in respect to the exercise of that right. And this distinction is well recognized by the courts: *Gasser v. Sun Fire Office*, 42 Minn. 815, and cases; *Guilford v. Minneapolis etc. Ry. Co.*, 48 Minn. 560; 81 Am. St. Rep. 694. The provisions of this mortgage are not, we think, unreasonable or invalid.

It is suggested that the trustees in the several mortgages have no right to raise this question, but we think the provisions in question were intended for the benefit of the bondholders, as well as the mortgagor, and therefore the trustees, who, we may assume, represent the majority of the bondholders, are entitled to object to the relief sought by the defendant, on the ground that it is contrary to the stipulations in the mortgage above referred to. It is also urged that the Central Trust Company, which is trustee in several mortgages, cannot properly act for the interests of the various bondholders¹⁵⁷ which are conflicting. However this may be, we fail to see how that fact can affect the question raised by the demurrer, because, if the provisions of the mortgage we have been considering are valid, the intervener has no standing in court to have the mortgages foreclosed.

Orders affirmed.

INTERVENTION.—WHO MAY BECOME INTERVENERS: See the extended note to *Lacroix v. Menard*, 15 Am. Dec. 162, 163, and *Denis v. Spencer*, 51 Minn. 259; *ante*, p. 499, and note.

PLEADING.—IF ANY ONE COUNT IN A COMPLAINT IS GOOD a demurrer to the whole must be overruled, though the other counts are bad in substance: *United States v. White*, 2 Hill, 59; 37 Am. Dec. 374; *Lane v. Levilhan*, 2 Ark. 76; 37 Am. Dec. 769; *Freeland v. McCullough*, 1 Denio, 414; 43 Am. Dec. 685; *Smith v. Salomon*, 1 Col. 176; 91 Am. Dec. 711.

THOMSON-HOUSTON ELECTRIC CO. v. PALMER.

[52 MINNESOTA, 174.]

PLEADING—FOREIGN LAWS NEED NOT BE SPECIALLY PLEADED, WHEN.—

The rule that foreign laws must be pleaded and proved like other facts is not applicable when they consist of mere matters of evidence. Hence, under a general plea of payment, it is competent for a debtor to prove that, according to the laws of a sister state upon which the nature of his obligation depends, a creditor's acceptance of his debtor's promissory note for a pre-existing debt operates as an extinguishment thereof.

TRIAL—EFFECT OF EVIDENCE, WHEN A QUESTION FOR THE COURT.—

Where the evidence as to the law of another state consists entirely of the judicial opinions of that state, the question of their construction and effect is one for the court alone.

CONTRACTS—LEX LOCI.—The question whether the giving of a promissory note for an antecedent debt operates as a payment and extinguishment thereof is one which goes to the force and effect of the contract itself, and must therefore be determined by the law of the state where the contract was entered into.**EVIDENCE—PAROL PROOF OF CONTENTS OF LETTERS, WHEN PERMISSIBLE.**

A sufficient foundation for the introduction of secondary proof of the contents of letters from the plaintiff to one of the defendants is laid by showing that the latter is beyond the jurisdiction of the court, and that, while his deposition was being taken in another state, he refused to produce the letters in question, the terms in which his refusal was couched being such as to indicate clearly that he was acting in the interest of his co-defendant.

THE Illinois cases upon which the court based its judgment are as follows: *Fridley v. Bowen*, 5 Bradw. 191; *Morrison v. Smith*, 81 Ill. 221; *White v. Jones*, 38 Ill. 159; *Gage v. Lewis*, 68 Ill. 604; *Anderson v. Armstead*, 69 Ill. 452; *Yates v. Valentine*, 71 Ill. 643; *Kappes v. George E. White Hard Wood Lumber Co.*, 1 Bradw. 280; *Smalley v. Edey*, 19 Ill. 207; *Ralston v. Wood*, 15 Ill. 159; 58 Am. Dec. 604; *Hoodless v. Reid*, 112 Ill. 105; *Cox v. Keiser*, 15 Bradw. 432; *Walsh v. Lennon*, 98 Ill. 27; 38 Am. Rep. 75; *Wilhelm v. Schmidt*, 84 Ill. 183.

F. B. Wright, for the appellant.

Samuel A. Anderson, for the respondent.

177 MITCHELL, J. This action was brought on an account for goods, wares, and merchandise, sold and delivered in Chicago, Illinois, by plaintiff to defendant and one Thompson. Thompson was a nonresident, and was not served with process, and never appeared, so that the action proceeded against Palmer alone. His principal defense was that the

account had been paid by promissory notes executed by Thompson and indorsed by himself, and which he alleged plaintiff received and accepted as payment of the account. The giving and receiving of the notes for the amount of the account (a pre-existing debt) was not disputed.

Although casually signed in Missouri the notes were delivered and were payable in Illinois; and it is not questioned but that they were Illinois contracts, and, as respects their nature and obligatory force, governed by the laws of that state; the only contention being as to whether the law of that state or that of Minnesota applied in determining whether they operated to pay and extinguish the original debt.

On the trial there was no evidence of an express agreement, one way or other, on the subject, and no circumstances (at least none favorable to plaintiff) from which any agreement could be implied, unless it was the mere fact that the notes had been given and received. Upon the motion for a new trial the court below, contrary to his rulings on the trial, held that the law of Illinois applied; and that the law of that state, differing from that of Minnesota, was that, in the absence of any agreement of the parties to the contrary, the giving and receiving of the debtor's promissory note for a pre-existing debt due on simple contract constituted payment and extinguishment of the original debt. As the evidence as to the law of Illinois consisted entirely of the judicial opinions of that state, the question of their construction and effect was one for the court alone: *Di Sora v. Phillipps*, 10 H. L. Cas. 624; *Kline v. Baker*, 99 Mass. 255.

Neither is there any thing in plaintiff's point that the law of Illinois should have been specially pleaded. Having pleaded payment, ¹⁷⁸ the defendant was entitled to introduce evidence of any facts tending to prove that plea. The rule, of course, is that the courts will not take judicial notice of the laws of another state or country, differing from our own, but that they must be pleaded and proved the same as any other facts. But this rule does not require such laws to be pleaded when they consist of mere matters of evidence. They stand on the same footing as any other fact, to be pleaded only when they are issuable, as distinguished from probative or evidential facts.

It is urged that the trial court misconstrued the judicial decisions of Illinois, and that in fact the law of that state is the same as that of Minnesota. In determining this ques-

tion we have necessarily had to confine our consideration to the particular decisions introduced in evidence. As the court below very correctly remarked, if the law of that state was to be determined by the *obiter dicta* in the numerous decisions of its courts there might be very grave doubt and uncertainty as to what the law of Illinois is.

This is shown by the fact that several of their decisions are cited, carelessly perhaps, by text-writers, as authority for the common-law rule which obtains in this and most of the other states; and we are by no means certain what the courts of that state will decide the law to be when they are squarely confronted with the question after full argument. But, like the court below, we think that *White v. Jones*, 38 Ill. 159, lays down what is often called the "Massachusetts rule," and is an authority in favor of defendant's contention, and that, keeping in mind the difference in the facts, and the distinction between what was essential to the decision of the respective cases and what is mere *dictum*, this case is not overruled by *Wilhelm v. Schmidt*, 84 Ill. 187.

We therefore conclude that the law of Illinois is that the taking of the debtor's promissory note for a pre-existing debt is *prima facie* payment—that is, operates as payment and extinguishment of the original debt—unless the parties have agreed to the contrary; while the law of this state is that it does not, unless the parties have agreed that it shall have that effect. Of course, we do not mean that the agreement to make the case exceptional must be express, for in either state such an agreement may be applied from circumstances; ¹⁷⁹ but what we do mean is that where, as in this case, there is no express agreement on the subject, and no circumstances from which an agreement can be implied—nothing but the bare fact that the note was given and received—then, in Illinois, the note extinguishes the debt, while in this state it would not, unless the note itself is paid.

The question, then, remains, which applies to this case, the law of Illinois or the law of Minnesota? There is no controversy as to the general rule on the subject, the only difficulty being as to its application. In respect to all questions as to forms, or methods, or conduct of process, or remedy, including mere rules of evidence, the law of the forum governs; but the settled doctrine of public law is that personal contracts are to have the same validity, interpretation, and obligatory force

in every other country (unless against its public policy) which they have in the country where they were made: 2 Kent's Commentaries, 257, 258. The *lex loci contractus* (referring to the place of the seat of the contract, as distinguished from the place where it may casually happen to have been signed, and which may govern in mere matters of form or solemnization) is *prima facie* that which the parties intended to apply, and therefore the law which, in the absence of circumstances indicating a different intention, ought to prevail in all matters pertaining to the right and merit of the contract, or what the civilians call "*naturalia contractus*." This doctrine is perhaps as clearly and tersely stated by Tindall, C. J., as any one, as follows: "So much of the law as affects the rights and merit of the contract—all that relates *ad litis decisionem*—is adopted from the foreign country; and so much of the law as affects the remedy only—all that relates *ad litis ordinationem*—is taken from the *lex fori*, where the action is brought": *Huber v. Steiner*, 2 Scott, 304. Of course he was speaking of personal contracts. The law of the place of making the contract, if it is to be there performed, enters into, and forms a part of, the contract as to all questions touching its obligation and interpretation; as, for example, whom it binds, and to what extent; what is included and what is excluded. Whoever contracts in a country is presumed to know its law, and whatever he does not express plainly he refers to the interpretation of ¹⁸⁰ the law, and wills and intends that which the law itself wills and intends. This is included in the contract, without being expressly mentioned, by operation of law. Applying these principles to the case in hand, we are of opinion that the question whether the giving of these promissory notes operated as a payment and extinguishment of the antecedent debt is one which goes to the force and effect of the contract itself, and is not a mere rule of evidence, and therefore the law of Illinois applies. To hold otherwise would, it seems to us, be to make a contract for parties different from that which they made for themselves. Suppose, for example, as in this case, the contract is made in Illinois, and the party gives his note for an existing debt, without any express agreement as to its effect on the original debt, and in the absence of any circumstances from which any agreement to make the case exceptional can be implied. By the laws of that state, with reference to which he presumably contracts, it extinguishes the original debt, and thereafter his only liability is on his

note. But if he is sued in this state on the original debt, if our law is to apply, he is liable, notwithstanding his implied contract to the contrary. Suppose, on the other hand, the contract is made in Minnesota, and, the note not being paid, the creditor sues on the original debt in Illinois. If the law of that state applies, his action must fail, although he took the note in reliance on the laws of this state, without any intention thereby to discharge or release the original debt. It seems to us that this is more than a question of remedy, but goes to the right of the contract. So far as we can find, New Hampshire is the only state in which the question in this precise form has ever been passed on. It is there held that it is the law of the state where the note was given which applies: *Ward v. Howe*, 38 N. H. 35. See, also, *Pecker v. Kenison*, 46 N. H. 488, and *Gilman v. Stevens*, 63 N. H. 342. The doctrine of these cases is cited approvingly in *Parsons on Contracts*, 719. *Ely v. James*, 123 Mass. 36, although not an authority on the question, is suggestive, for the reason that some of the points raised would naturally have been otherwise disposed of had the court considered that they involved merely a rule of evidence, to be determined by the law of the forum.

Counsel for plaintiff relies greatly on *Hoadley v. Northern Transportation* ¹⁸¹ Co., 115 Mass. 304, 15 Am. Rep. 106, and at first sight it would seem more nearly an authority in his favor than any other case cited. But, without considering whether that case was rightly decided, we think it is clearly distinguishable from the present. The question there was merely one of evidence of plaintiff's assent to the terms of the bill of lading.

With reference to another trial, we may add that we are of opinion that sufficient foundation was laid for the introduction of secondary evidence of the contents of the letters from plaintiff to Thompson. Plaintiff had done all that it could do to procure the originals in Thompson's possession. He was beyond the jurisdiction of the court, and could not be reached by process. When his deposition was being taken in Kansas, on his cross-examination, plaintiff called for the production of the letters, which Thompson positively refused to do, and in such terms as to indicate clearly that he was acting in the interest of the defendant. It is not material that his deposition was being taken on motion of defendant, and not of plaintiff: *Stephen's Digest of the Law of Evidence*, art. 71 b. Order affirmed.

FOREIGN LAWS—NECESSITY FOR PLEADING.—The laws of a sister state must be averred and proved as any other fact: *Bank of Commerce v. Fuqua*, 11 Mont. 285; 28 Am. St. Rep. 461, and note; *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep. 67, and note; *Peck v. Hibbard*, 28 Vt. 698; 62 Am. Dec. 605; *Mason v. Wash, Breeze*, 39; 12 Am. Dec. 138; *Continental Nat. Bank v. McGeoch*, 73 Wis. 332.

EVIDENCE—PAROL OF CONTENTS OF LETTERS.—Parol evidence of the contents of a letter is inadmissible unless the letter is produced or its loss or destruction accounted for: *Rumbaugh v. Southern Imp. Co.*, 112 N. O. 751; 34 Am. St. Rep. 528.

CONTRACTS.—LEX LOCI, WHEN GOVERNS: See *Miller v. Wilson*, 146 Ill. 523; 37 Am. St. Rep. 186, and note; *Forepaugh v. Delaware etc. R. R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672; *Woodward v. Brooks*, 128 Ill. 222; 15 Am. St. Rep. 104, and note; *Robinson v. Queen*, 87 Tenn. 445; 10 Am. St. Rep. 690, and extended note.

LAMPREY v. STATE.

[52 MINNESOTA, 181.]

PUBLIC LANDS—ISSUANCE OF PATENT TO LAND BORDERING ON MEANDERED LAKE, EFFECT OF.—After the United States has, by patent, disposed, without reservation or restriction, of lands bordering on a meandered lake, they have nothing further to convey, and therefore a subsequent patent to land formed outside the meander line by the gradual drying up of the lake is inoperative and void.

BOUNDARIES.—A MEANDER LINE IS NOT A BOUNDARY, the water whose body is meandered being the true boundary, whether the meander line actually coincides with the shore or not.

PUBLIC LANDS, CONSTRUCTION OF GRANTS OF, BY WHAT LAW DETERMINED. Where public lands bounded on streams or other waters are granted by the United States without reservations or restrictions, the riparian rights of the grantee are determined by the law of the state in which the lands are situated.

RIPARIAN RIGHTS OF OWNERS OF LAND BORDERING ON LAKES.—By the common law, the same rules as to riparian rights which apply to streams apply also to lakes or other bodies of still water. Hence, if a meandered lake is non-navigable in fact, the patentee of land bordering thereon takes to the middle of the lake, while, if the lake is navigable in fact, its waters and bed belong to the state in its sovereign capacity, and the riparian patentee takes the fee only to the waters' edge, but with all the rights incident to riparian ownership on navigable waters, including the right to accretions or relictions formed in front of his land by the action or recession of the water.

WATERS AND WATERCOURSES.—NAVIGABLE WATERS, WHAT ARE.—Navigable waters include not only those in which the tide ebbs and flows, but those which are navigable in fact, and afford a channel for commerce or subserve any other beneficial public use.

SUIT for partition of land which had formerly been the bed of a lake. The state was made a party for the purpose of determining whether it had any interest in the land, and the

answer filed in its behalf alleged, among other things, that by the act which Congress passed in 1857, authorizing a state government; the waters of the lake had been made a common highway, free to all citizens, and that the title to those waters thereupon vested in the state and had ever since continued therein. On the trial the plaintiffs proved that, in 1856, all the lands bordering on the lake had been patented, without any reservation to purchasers, from whom the plaintiffs and their cotenant had since acquired title; that in 1860 the lake had receded considerably, that the land thus formed had been surveyed by the federal government and granted to one Gilmore, who afterwards conveyed to the plaintiffs; that thereafter the lake had continued to recede, and finally left its bed completely dry. The plaintiff had judgment against the state, which was declared to have no interest in the land to be partitioned.

Moses E. Clapp, attorney general, H. W. Childs, and W. N. Jones, for the appellant.

Stryker and Moore, permitted to file a brief, as being of counsel for parties in other cases involving the same questions as the present suit.

U. L. Lamprey, pro se.

190 MITCHELL, J. In 1853, at the time of making the United States survey of sections four (4), five (5), eight (8), and nine (9), township twenty-eight (28), range twenty-two (22), there was in the center of these four sections a shallow, non-navigable lake, comprising about three hundred acres, which the government surveyor meandered, in accordance with the rules and instructions of the department, "to meander all lakes and deep ponds of the area of twenty-five acres and upwards" (1 Lester, Land Laws, 714), and in doing so ran the meander lines substantially along the margin of the lake. The lake and the meanders thereof appear on the official plat of the survey, and are referred to in the field notes. By this survey the lands bordering on the lake were subdivided into fractional governmental subdivisions and lots, the lake forming the boundary thereof on one side. The survey and plat were approved by the secretary of the interior in 1854. Subsequently, and prior to 1856, the United States, by patents, conveyed, without reservation or restriction, to various parties, all of these lands, which were described in

the patents by their governmental subdivision or lot, according to the plat and survey, which were referred to in, and made part of, the patents. By sundry mesne conveyances from the patentees, the plaintiffs and defendant Metcalf have become the owners of all these riparian lands. Since the survey in 1853 the lake has been, through natural causes, gradually and imperceptibly drying up, until now its former bed is all dry land.

In 1860, after the lake had partially dried up, the United States ¹⁸⁶¹ land department caused a survey to be made of the land constituting that part of the former bed of the lake situate between the original meander line and the then existing margin of the lake, and in 1873 assumed to issue a patent therefor to one Gilmore, who subsequently conveyed to plaintiffs and Metcalf, who assert title to the former bed of the lake both as grantees of the riparian lands according to the original survey of 1853, and also, in part, under the Gilmore patent. The state, on the other hand, claims that the Gilmore patent is void, and that the patents, according to the original United States survey, only conveyed the land to the margin of the lake, as it then existed, and that the former bed of the lake belongs to the state, in its sovereign capacity. In the pleadings the state also asserted title under the "swamp-land grant" from the United States; but this claim was abandoned on the trial, and very properly so, because, for manifest reasons, it was entirely untenable.

It will be thus seen that the question presented is, what rights in or to the soil under water does the patentee of land bounded by a meandered inland lake acquire by his patent? The same question was suggested in *Huntsman v. Hendricks*, 44 Minn. 423, but not decided, in view of its great importance, and the fact that it was not fully argued by counsel.

The importance of the question, both to the public and to riparian owners, is apparent, when we consider that there are many thousands of such lakes in this state, which, although most of them may not be adapted for navigation, in its ordinary commercial sense, have been, from the earliest settlement of the state, resorted to and used by the people as places of public resort, for purposes of boating, fishing, fowling, cutting ice, etc., and the further fact that observation teaches that the waters of many of these lakes are, from natural causes, slowly, but imperceptibly, receding, so that a

part of what was their bed, when surveyed, has, or in time will, become dry land.

The right of the public to use these lakes for the purposes referred to, as well as the right of riparian owners to these relicted lands, and consequently their right of access to the water after such reliction occurs, are, therefore, all involved in the question presented. The question ought to be approached and considered from a practical, as ¹⁸⁹² well as legal, standpoint; and as the common law is a body of principles, and not of mere arbitrary rules, the effort should be to apply the spirit and reason of these principles to the state of facts presented.

There are certain matters which are so well settled that they may be summarily disposed of at the outset. Without troubling ourselves to consider what were the rights of the United States in these waters before they conveyed the lands bordering on them, it is well settled that, having disposed of lands bordering on a meandered lake by patent, without reservation or restriction, they have nothing left to convey, and, consequently, the land department was thereafter without jurisdiction, and the Gilmore patent, issued in 1873, was inoperative and void; also, that a meander line is not a boundary, but that the water whose body is meandered is the true boundary, whether the meander line in fact coincides with the shore or not; also, that grants by the United States of its public lands bounded on streams or other waters, made without reservation or restriction, are to be construed according to the law of the state in which the lands lie; and, consequently, whether the land forming the beds of these lakes belongs to the state, or to the owners of the riparian lands, is a question to be determined entirely by the laws of Minnesota. In support of these propositions, we need only cite *Hardin v. Jordan*, 140 U. S. 371, and *Mitchell v. Smale*, 140 U. S. 406.

In *St. Paul etc. R. R. Co. v. First Div. St. Paul etc. R. R. Co.*, 26 Minn. 31, this court was led, from certain dicta, in *Railroad Co. v. Schurmeir*, 7 Wall. 272, to suppose that the supreme court of the United States meant to hold otherwise as to patents of public lands bordering on navigable streams; but that no such doctrine has been adopted by that court is evident from *Barney v. Keokuk*, 94 U. S. 324, and subsequent cases.

We therefore approach the question in this case untram-

meled by the binding authority of any federal decisions, or even by any direct decisions in this state, in which this is still an open question. What the relative rights of the state and of riparian owners in the waters and beds of these lakes are largely depends upon the question whether ¹⁹³ the rules of law as to the rights of grantees of lands bordering on running streams are applicable to grants of land bordering on lakes. The early English decisions, dealing, as they did, mainly with arms of the sea and rivers in which the tide ebbed and flowed, furnish but little light on this subject.

In many of the states of the Union this branch of the law is still somewhat unsettled, and as said in *Huntsman v. Hendricks*, 44 Minn. 423, the decisions are somewhat conflicting. The subject was recently very ably and exhaustively considered by that eminent jurist, the late Justice Bradley, in *Hardin v. Jordan*, 140 U. S. 371, in which all the authorities—Roman, English, and American—are collected and reviewed; and we think we may fairly say of the decision in that case that the result and logic of it is that at common law the rules governing riparian rights on streams apply *mutatis mutandis* to grants of land bordering on lakes; consequently, if they are non-navigable, the grantees (if their grants are without reservation or restriction), take to the center of the lake, but that if they are navigable the grantees take the fee only to high water, with all the riparian rights incident to the ownership of riparian land, including the right to accretions and relictions. It is true that case was controlled by the law of Illinois, and the only question was what the law of that state was; but, having determined that the courts of Illinois had adopted the common law on the subject, it became necessary to ascertain what the common law was; and in that point of view the conclusion arrived at on that question is pertinent here.

As has been already suggested, there are but few authorities on the question in England; for in England proper there are but few lakes, and in Scotland the civil law prevails. The case of *Bristow v. Cormican*, L. R. 3 App. Cas. 641, goes far towards sustaining the conclusion reached in *Hardin v. Jordan*, 140 U. S. 371, although it must be admitted that it is left in some doubt as to whether the presumption of ownership to the thread of the stream, which exists with regard to owners of land on the banks of nontidal streams of running water, exists also on inland lakes, navigable in fact, but non-navigable in the common-law sense.

Coulson and Forbes, in their work on the Law of Waters, page 98, say that it does not appear that by the English law there is any difference as to the ownership of the soil between land covered with still ¹⁹⁴ and running water, except, perhaps, in the case of large inland lakes or seas, where the rule that the adjoining riparian owner is owner *ad medium filum aquæ* might cause inconvenience.

The decisions in Massachusetts (of which Maine was a part), and which have been followed in most of the New England states, are not particularly in point, for the reason that they have their foundation in the colonial ordinance of 1641-1647, prohibiting towns from granting away ponds containing more than ten acres, called "great ponds," and providing that such ponds should be free to the public for fishing and fowling.

In New Jersey, which adhered strictly to the old common-law definition of "navigable waters," it was held that a lake (which, according to the English common law, was non-navigable) was the private property of the riparian owner; thus applying the same rule that would be applied in case of a non-navigable stream: *Cobb v. Davenport*, 32 N. J. L. 369.

Whatever doubt once existed as to the law in New York would seem to be fully set at rest by the recent decision of the court of appeals (second division) in *Gouverneur v. National Ice Co.*, 134 N. Y. 355, 30 Am. St. Rep. 669, in which, after reviewing all the decisions of the state on the subject, the court holds, "that a deed of land bordering on a small, non-navigable lake or pond is *prima facie* presumed to convey title to the center," saying, there would seem to be no substantial reason for the application of a different rule in the legal construction of grants of land bounded on them than is applied to conveyances bounding premises on fresh-water streams, and that the difficulty in locating lines, under this rule, of different proprietors, is not an objection to its general application, as the same difficulties would be met with in the bays or bends of rivers. Substantially the same views are expressed in *Lembeck v. Nye*, 47 Ohio St. 336, 21 Am. St. Rep. 828, the court saying, that no solid ground is readily perceived for limiting a grant of land bordering on a non-navigable lake to the water's edge, when, in the case of a non-navigable stream, its operation extends to the center.

In *Ridgway v. Ludlow*, 58 Ind. 248, it was held that the owner of land bordering on a non-navigable lake, lying within

the congressional ¹⁹⁵ survey, is the owner of the bed of the lake to the thread thereof, or a line along the middle of the lake; the court adding that they could see no difference between non-navigable lakes and non-navigable rivers, although later, as will be seen, the court somewhat limited this common-law right.

In *Rice v. Ruddiman*, 10 Mich. 125, the rule of riparian ownership previously applied to the Detroit river was applied to Lake Muskegon; the court saying that they were not able to discover any fact or circumstance sufficient to make a substantial difference in principle between the two cases, and that the general understanding and common usage of the country have as clearly recognized the principles of riparian ownership with reference to lakes as to rivers within the state, and repudiated any distinction as arbitrary, having no foundation in the nature of things. The same court, in *Clute v. Fisher*, 65 Mich. 48, followed in *Stoner v. Rice*, 121 Ind. 51, limited this common-law right by holding that the riparian owner of a fractional lot bounded by a non-navigable lake could only take so much of the lake as is required to fill out the subdivision of the section which he owned. The court seemed to think that they were required to so hold, under the decision in *Brown's Lessee v. Clements*, 3 How. 650, but which, with due deference, does not seem to us to have the least application to the question of riparian rights under a grant of land bordering on water. But, having held that the bed of a non-navigable lake belonged neither to the state nor the United States, the court was compelled to the somewhat peculiar position of holding that if the lake was so large that the lines of the granted lots or fractional subdivisions would not, when extended, embrace the whole of it, then the riparian ownership would extend to the center. We are compelled to the conclusion that this attempted limitation upon riparian ownership is illogical, purely arbitrary, and impracticable.

The same question has been before the courts of Wisconsin in several cases: *Delaplaine v. Chicago etc. Ry. Co.*, 42 Wis. 214; 24 Am. Rep. 386; *Boorman v. Sunnuchs*, 42 Wis. 233; and *Diedrich v. Northwestern Union Ry. Co.*, 42 Wis. 248; 24 Am. Rep. 399.

¹⁹⁶ The general result of these decisions is that, while the courts of that state hold that, whether a stream is navigable or non-navigable in fact, the title of the bed to the center of

the current is in the owner of the bank, but that as to lakes a different rule applies, and that the owner of the land bordering on any meandered lake, whether navigable in fact or not, takes the land only to the water's edge; but no special reason is given why a different rule should be applied.

The courts of that state do, however, hold that the riparian proprietor has, as such, the exclusive right of access to and from the lake in front of his land, and of building his piers and wharves in the aid of navigation, not interfering with the public easement where the lake is navigable; also, that he has the accretions formed upon or against his land and those portions of the bed of the lake adjoining his land which may be uncovered by the recession of the water; there being no distinction, in respect to the rights of riparian owners, between accretions and relictions. With these rights conceded to the riparian owner, the question whether the fee of the bed of the lake, while it remains covered with water, is in him or in the state, is more speculative than practical. In most cases where a distinction has been made between riparian rights on streams and on lakes it seems to have been merely assumed, without much consideration, that the rules applicable to running water were not applicable to lakes or ponds. The only reasons we have ever seen suggested for a distinction are: 1. The supposed difficulty of running the lines between adjoining riparian owners of lands bordering on lakes; and 2. The supposed injustice that might result, in some cases, in giving the owner of a very small estate on the shore of a lake a very large reliction in front of it.

But it seems to us that neither of these is an adequate reason for departing from a well-settled principle. Both of them are more imaginary than real, and would occur only in exceptional or extreme cases, and are almost as likely to occur in the case of riparian ownership on a tortuous river, with an ill-defined or changeable channel, as in the case of such ownership on the borders of a lake. The owner of a mere "rim" on the bank of a river may sometimes acquire ¹⁹⁷ an accretion or reliction much larger than the parent estate, but that is an incident to all riparian ownership; and it was never suggested, in the case of a stream, that such a state of facts furnished any reason for making the case an exception to the general rule.

Courts and text-writers sometimes give very inadequate reasons, born of a fancy or conceit, for very wise and benefi-

cent principles of the common law; and we cannot help thinking this is somewhat so as to the right of a riparian owner to accretions and relictions in front of his land. The reasons usually given for the rule are either that it falls within the maxim, *de minimis lex non curat*, or that because the riparian owner is liable to lose soil by the action or encroachment of the water, he should also have the benefit of any land gained by the same action. But it seems to us that the rule rests upon a much broader principle, and has a much more important purpose in view, viz., to preserve the fundamental riparian right—on which all others depend, and which often constitutes the principal value of the land—of access to the water.

The incalculable mischiefs that would follow if a riparian owner is liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the water line had been changed by accretions or relictions, are self-evident, and have been frequently animadverted on by the courts. These considerations certainly apply to riparian ownership on lakes as well as on streams. Take the case in hand of our small inland lakes, the waters of many of which are slowly but gradually receding.

The owners of lands bordering on them have often bought with reference to access to the water, which usually constitutes an important element in the value and desirability of the land. If the rule contended for by the appellants is to prevail, it would simply open the door for prowling speculators to step in and acquire title from the state to any relictions produced in the course of time by the recession of the water, and thus deprive the owner of the original shore estate of all riparian rights, including that of access to the water. The endless litigation over the location of the original water lines, and the grievous practical injustice to the owner of the original riparian estate that would follow, would, of themselves, be ¹⁹⁸ a sufficient reason for refusing to adopt any such doctrine. That the state would never derive any considerable pecuniary benefit—certainly none that would at all compensate for the attendant evils—we may, in the light of experience, safely assume.

Our conclusion, therefore, is that upon both principle and authority, as well as consideration of public policy, the common law is, that the same rules as to riparian rights which apply to streams apply also to lakes or other bodies of still water.

In this state we have adopted the common law on the subject of waters, with certain modifications, suited to the difference in conditions between this country and England, the principal of which are that navigability in fact, and not the ebb and flow of the tide, is the test of navigability, and that we have repudiated the doctrine that the state has any private or proprietary right (as had the king) in navigable waters, but that it holds them in its sovereign capacity, as trustee for the people, for public use.

In accordance with the rules of the common law, we therefore hold that where a meandered lake is non-navigable in fact, the patentee of land bordering on it takes to the middle of the lake; that where the lake is navigable in fact, its waters and bed belong to the state, in its sovereign capacity, and that the riparian patentee takes the fee only to the water's edge, but with all the rights incident to riparian ownership on navigable waters, including the right to accretions or relictions formed or produced in front of his land by the action or recession of the water. Of course, it is a familiar principle that these riparian rights rest upon title to the bank or shore, and not upon title to the soil under the water.

Comparing what was said in *Schurmeier v. St. Paul etc. R. R. Co.*, 10 Minn. 82, 88 Am. Dec. 59, with what is perhaps implied in *St. Paul etc. R. R. Co. v. First Div. St. Paul etc. R. R. Co.*, 26 Minn. 31, it may be not entirely clear whether the doctrine of this court is that a patentee of land on navigable water takes the fee to low water or only to high water; but this is a matter of little practical importance in any case, and of none in the present one.

What has been already said is sufficient for the purposes of the present case; but to avoid misconception, it is proper to consider ¹⁹⁹ what is the definition or test of "navigability," as applied to our inland lakes. The division of waters into navigable and non-navigable is but a way of dividing them into public and private waters—a classification which, in some form, every civilized nation has recognized—the line of division being largely determined by its conditions and habits.

In early times, about the only use—except, perhaps, fishing—to which the people of England had occasion to put public waters, and about the only use to which such waters were adapted, was navigation, and the only waters suited to that purpose were those in which the tide ebbed and flowed. Hence, the common law very naturally divided waters into

navigable and non-navigable, and made the ebb and flow of the tide the test of navigability. In this country, while still retaining the common-law classification of navigable and non-navigable, we have, in view of our changed conditions, rejected its test of navigability, and adopted in its place that of navigability in fact; and while still adhering to navigability as the criterion whether waters are public or private, yet we have extended the meaning of that term so as to declare all waters public highways which afford a channel for any useful commerce, including small streams, merely floatable for logs at certain seasons of the year. Most of the definitions of "navigability" in the decided cases, while perhaps conceding that the size of the boats or vessels is not important, and, indeed, that it is not necessary that navigation should be by boats at all, yet seem to convey the idea that the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But, if under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit.

Many, if not the most, of the meandered lakes of this state, are not adapted to and probably will never be used to any great extent for commercial navigation; but they are used—and as population increases, and towns and cities are built up in their vicinity, will be ²⁰⁰ still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated. When the colony of Massachusetts, two hundred and fifty years ago, reserved to public use her "great ponds," probably only fishing and fowling were in mind; but, as is said in one case, "with the growth of the community, and its progress in the arts, these public reservations, at first set apart with reference to certain special uses only, became capable of many others, which are within the design and intent of the original

appropriation. The devotion to public use is sufficiently broad to include them all, as they arise": *West Roxbury v. Stoddard*, 7 Allen, 158.

If the term "navigable" is not capable of a sufficiently extended meaning to preserve and protect the rights of the people to all beneficial public uses of these inland lakes, to which they are capable of being put, we are not prepared to say that it would not be justifiable, within the principles of the common law, to discard the old nomenclature, and adopt the classification of public waters and private waters. But, however that may be, we are satisfied that, so long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common-law rule. When the waters of any of them have so far receded or dried up as to be no longer capable of any beneficial use by the public, they are no longer public waters, and their former beds, under the principles already announced, would become the private property of the riparian owner.

Judgment affirmed.

WATERS AS BOUNDARIES.—This question is thoroughly discussed in the monographic note to *Allen v. Weber*, 27 Am. St. Rep. 56-63.

WATERCOURSES—NAVIGABLE—WHAT ARE.—The definition of navigable waters and the several classes thereof will be found given in *Gaston v. Mace*, 33 W. Va. 14; 25 Am. St. Rep. 848, and note, where the cases are collected.

RIPARIAN RIGHTS OF OWNERS OF LANDS BORDERING ON LAKES.—A grant of land bounded on a non-navigable lake extends to its center: *Gouverneur v. National Ice Co.*, 134 N. Y. 355; 30 Am. St. Rep. 669, and note; *Lembeck v. Nye*, 47 Ohio St. 336; 21 Am. St. Rep. 828, and note. See, also, the extended note to *Miller v. Mendenhall*, 19 Am. St. Rep. 230.

FINNEGAN v. NOERENBERG.

[52 MINNESOTA, 239.]

CORPORATION DE FACTO, WHEN CONSTITUTED.—To give a body of men the status of a *de facto* corporation, there must have been an apparent attempt on their part to perfect a corporate organization under statutory authority, and a user of corporate powers pursuant to such attempted organization. If these conditions are satisfied, it is not necessary that there should have been a full, or even a substantial, compliance with the provisions of the law.

CORPORATION DE FACTO, INFORMALITY NOT PREVENTING BODY FROM BECOMING.—The omission to state distinctly in the articles filed by a body of men assuming to form a corporation, the place where its business is to be carried on will not prevent such body from acquiring the rights of a corporation *de facto*.

CORPORATIONS DE FACTO.—A SUFFICIENT USER OF CORPORATE RIGHTS to impart the character of a corporation *de facto* to a body of men who have attempted to organize under the law is shown by the collection of subscriptions to the capital stock of the association, the election of officers, the adoption of by-laws, the purchase of a lot, the erection of a building thereon, and the demise of portions of that building to various tenants.

STATUTE—SUBJECT MATTER OF WHEN NOT VARIANT FROM TITLE.—An act empowering the formation of “co-operative associations” is not open to the constitutional objection that its title does not express its subject, when its provisions are couched in language which shows that it was designed mainly for the purpose of enabling men of small capital, or of no capital but their labor and skill in trades, to form corporations and thus give employment to such capital or labor and skill.

Savage and Purdy, for the appellant.

Ankeny and Irwin, for the respondents.

242 GILFILLAN, C. J. Eight persons signed, acknowledged, and caused to be filed and recorded in the office of the city clerk in Minneapolis, articles assuming and purporting to form, under Laws 1870, chapter 29, a corporation, for the purpose, as specified in them, of “buying, owning, improving, selling, and leasing of lands, tenements, and hereditaments, real, personal, and mixed estates and property, including the construction and leasing of a building in the city of Minneapolis, Minn., as a hall to aid and carry out the general purposes of the organization known as the ‘Knights of Labor.’” The association received subscriptions to its capital stock, elected directors and a board of managers, adopted by-laws, bought a lot, erected a building on it, and, when completed, rented different parts of it to different parties. The plaintiff furnished plumbing for the building during its construction, amounting to five hundred and ninety-nine dollars and fifty cents, for which he brings this action against several subscribers to the stock, as copartners doing business under the firm name of the “K. of L. Building Association.” The theory upon which the action is brought is that, the association having failed to become a corporation, it is in law a partnership, and the members liable as partners for the debts incurred by it.

It is claimed that the association was not an incorporation because: 1. The act under which it attempted to become incorporated, to wit, Laws 1870, chapter 29, is void, because its subject is not properly expressed in the title; 2. The act does not authorize the formation of corporations for the purpose or

to transact the business ²⁴³ stated in the articles; and 3. The place where the business was to be carried on was not distinctly stated in the articles, and they had, perhaps, some other minor defects.

It is unnecessary to consider whether this was a *de jure* corporation, so that it could defend against a *quo warranto*, or an action in the nature of *quo warranto*, in behalf of the state; for, although an association may not be able to justify itself when called on by the state to show by what authority it assumes to be, and act as, a corporation, it may be so far a corporation that, for reasons of public policy, no one but the state will be permitted to call in question the lawfulness of its organization. Such is what is termed a corporation *de facto*—that is, a corporation from the fact of its acting as such, though not in law or of right a corporation. What is essential to constitute a body of men a *de facto* corporation is stated by Selden, J., in *Methodist etc. Church v. Pickett*, 19 N. Y. 482, as: "1. The existence of a charter, or some law under which a corporation with the powers assumed might lawfully be created; and 2; A user by the party to the suit of the rights claimed to be conferred by such charter or law." This statement was apparently adopted by this court in *East Norway etc. Church v. Froislie*, 37 Minn. 447; but as it leaves out of account any attempt to organize under the charter or law, we think the statement of what is essential defective. The definition in Taylor on Private Corporations, page 145, is more nearly accurate: "When a body of men are acting as a corporation, under color of apparent organization, in pursuance of some charter or enabling act, their authority to act as a corporation cannot be questioned collaterally."

To give a body of men assuming to act as a corporation, where there has been no attempt to comply with the provisions of any law authorizing them to become such, the *status* of a *de facto* corporation might open the door to frauds upon the public. It would certainly be impolitic to permit a number of men to have the *status* of a corporation to any extent merely because there is a law under which they might have become incorporated, and they have agreed among themselves to act, and they have acted, as a corporation. That was the condition in *Johnson v. Corser*, 34 Minn. 355, ²⁴⁴ in which it was held that what had been done was ineffectual to limit the individual liability of the associates. They had not gone far enough to become a *de facto* corporation. They

had merely signed articles, but had not attempted to give them publicity by filing for record, which the statute required.

“Color of apparent organization under some charter or enabling act” does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A substantial compliance will make a corporation *de jure*. But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body being a corporation *de jure*; but if there be user pursuant to such attempted organization, it will not prevent it being a corporation *de facto*.

The title to chapter 29 is “An act in relation to the formation of co-operative associations.” Appellant’s counsel argues that the body of the act does not contain a single element of “co-operation,” as that term is generally understood. But how it is generally understood he does not inform us. In a broad sense, all associations, whether corporations or partnerships, are co-operative, for all members, either by their labor or capital, or both, co-operative to a common purpose. There is undoubtedly, in popular use of the terms, a more limited sense, though the precise limits are not well defined. There is no legal, as distinguishable from their popular, signification. In the Century Dictionary the term “co-operative society” is defined, “A union of individuals, commonly laborers or small capitalists, formed . . . for the prosecution in common of a productive enterprise, the profits being shared in accordance with the amount of capital or labor contributed by each member.” Taking the distinctive feature of a co-operative society to be that it is made up of laborers or small capitalists, it is manifest that the chapter intends to deal with just that sort of associations. Not only does it contemplate that the operations of the corporations shall be local, but the capital stock is limited to fifty thousand dollars, the stock which one member may hold to one thousand dollars. No one can become a shareholder without the ²⁴⁵ consent of the managers, and no one is entitled to more than one vote.

The provisions in the body of the act are in accord with the title, and it is therefore not open to the objection made against it.

The purposes for which, under the act, corporations may be formed, are "of trade, or of carrying on any lawful mechanical, manufacturing, or agricultural business." The main purpose of the act being to enable men of small capital, or of no capital but their labor and their skill in trades, to form corporations, for the purpose of giving employment to such capital or labor and skill, the language expressing the purposes for which such corporations may be formed ought not to be narrowly construed. Giving a reasonably liberal meaning to the word "trade" in the act, it would include the buying and selling of real estate, and, upon a similar construction, the word "mechanical" would include the erection of buildings. The doing of the mason, or brick, or carpenter, or any other work upon a building is certainly mechanical. There can be little question that corporations might be formed to do either of those kinds of work on buildings, and, that being so, there is no reason why they may not be formed to do all of them. There is no reason to claim that such a corporation must do its work as a contractor for some other person. It may do it for itself, and, as the act authorizes the corporation to "take, hold, and convey such real and personal estate as is necessary for the purposes of its organization," it may, instead of working for others as a contractor, make its profit by buying real estate, erecting buildings on it, and either selling or holding them for leasing.

The omission to state distinctly in the articles the place within which the business is to be carried on, though that might be essential to make it a *de jure* corporation, would not prevent it becoming one *de facto*.

The foundation for a *de facto* corporation having been laid by the attempt to organize under the law, the user shown was sufficient.

Judgment affirmed.

CORPORATIONS DE FACTO, WHEN EXIST.—A corporation *de facto* is a corporation organized and operated under color of the law, but not legally constituted: *American Salt Co. v. Heidenheimer*, 80 Tex. 344; 26 Am. St. Rep. 743; *Gibbs' Estate*, 157 Pa. St. 59; *Allen v. Long*, 80 Tex. 261; 26 Am. St. Rep. 735, and note; *Snider Sons' Co. v. Troy*, 91 Ala. 224; 24 Am. St. Rep. 887. See, further, the note to *Hildreth v. McIntire*, 19 Am. Dec. 67.

STATUTES.—SUBJECT EXPRESSED IN TITLE: See *State v. Harrub*, 95 Ala. 176; 36 Am. St. Rep. 195, and note, with the cases collected; *Blair v. State*, 90 Ga. 326; 35 Am. St. Rep. 206, and note, and the extended note to *Newell v. Duryea*, 25 Am. Rep. 239.

**CROOM v. CHICAGO, MILWAUKEE, AND ST. PAUL
RAILWAY COMPANY.**

[52 MINNESOTA, 296.]

RAILROAD COMPANIES, DUTY OF, TO AGED AND INFIRM PASSENGERS.—A railroad company is not bound to receive on its cars a passenger who, because of extreme youth or old age, or any physical or mental infirmities, is unable to take care of himself, unless he has an attendant with him; but if a person whose inability to care for himself is apparent or made known to the company's servants, and renders special care necessary, is actually accepted as a passenger, without an attendant, the company is negligent if it does not exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, that care being such as is reasonably necessary to insure the safety of the passenger, in view of his mental and physical condition.

H. H. Field and W. E. Todd, for the appellant.

Lovely and Morgan, for the respondent.

296 MITCHELL, J. The defendant accepted the plaintiff as a passenger on its train for transportation from Savannah, Illinois, by way of Austin, Minnesota, to Wells, in this state.

He was aged eighty years, feeble, and infirm in mind and body, and hence required special care and assistance during his journey, of which fact the defendant was informed when it accepted him as a passenger by a letter from its station agent at Savannah, which accompanied his ticket, and was exhibited to each successive conductor on the train. The train reached Austin before daylight, about four o'clock in the morning. At that point it was necessary for plaintiff to change cars, and take a train going west to Wells. The 297 two trains, on arrival at Austin, stood head to head on the same track alongside of the depot platform. When plaintiff's train arrived, an employee of defendant called to passengers going west to change cars, but no one assisted plaintiff to get off the one train, or to find his way to the other. Owing to his age and to his being encumbered with some luggage, the old man was the last person to get off the train, and by the time he did so all the other passengers had gotten out of sight. Although the depot platform was lighted by some oil lamps, yet it was somewhat dark, and the plaintiff, being in a strange place, under such circumstances, was evidently dazed, and unable to decide where to go or what to do. He says he kept "hunting round" without success to find his train and the other passengers, until finally he saw a man with a lantern, and asked him where he should go, and that

the man told him "to go up the steps," referring or directing him to what proved to be the steps up onto the platform of a coach on the west-bound train, and that the man hurried off, without giving him any assistance; that he (plaintiff), unaided, succeeded in getting up on the platform on the coach. On the other hand, one of defendant's employees testified that he saw the plaintiff on the station platform, tottering along as if he needed assistance, and that, after ascertaining his destination, helped him up onto the platform of the coach, and then left, supposing he would go into the car. The jury were at liberty to accept as true whichever statement they thought most credible.

The plaintiff, however, in his dazed condition, apparently mistook the platform of the car for something else, and instead of entering the car walked off in the dark, and fell to the ground on the opposite side of the train and near to another track, which was from four to six feet distant from the one on which the train stood, and sustained severe injuries. Defendant's yard foreman, who was superintending the switching of a car onto that track, stood within about eight feet and saw plaintiff fall, but assuming, apparently, that he was not seriously hurt and not in a place of danger, the foreman, without rendering any assistance, started off a distance of some fifty feet to open a switch to let the car and switch engine in onto that track. A switchman who was riding on the footboard of ~~298~~ the engine, as it approached, seeing plaintiff lying there in a place of danger, jumped off and picked him up. He testified that he did not know whether the engine "rubbed against" plaintiff or not, but the jury would have been justified in finding from the testimony of plaintiff himself that the engine came in contact with him as he was lying there along the track, and inflicted on him injuries in addition to those received by the fall.

Defendant's assignments of error are all directed to two points: 1. That there was no evidence to justify a verdict that defendant was guilty of any negligence; 2. That the court erred in giving plaintiff's ninth request, which was to the effect that if defendant's yard foreman saw plaintiff in a place of peril and was in a position to protect him from injury and failed to do so and thereby the plaintiff received additional injuries, then, for all such injuries resulting from the foreman's failure to perform his duty, the defendant would be liable.

1. Taking up these points in the order named, we are of

opinion that, under all the circumstances disclosed by the evidence, it was a question for the jury whether defendant's servants exercised proper care in directing and assisting the plaintiff from the incoming to the outgoing west-bound train. Of course, a railroad company is not bound to turn its cars into nurseries or hospitals, or its employees into nurses. If a passenger, because of extreme youth or old age, or any mental or physical infirmities, is unable to take care of himself, he ought to be provided with an attendant to take care of him. But if the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants, and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and that care must be such as is reasonably necessary to insure the safety of the passenger in view of his mental and physical condition. This is a duty required by law as well as the dictates of humanity: *Indianapolis etc. Ry. Co. v. Pitzer*, 109 Ind. 179; 58 Am. Rep. 387; *Sheridan v. Brooklyn etc. R. R. Co.*, 36 N. Y. 299 39; 93 Am. Dec. 490. Whether the defendant fully performed this duty was a question for the jury.

2. There was evidence making the instruction complained of applicable to the case, and it was properly given if the matter referred to was within the allegations of the complaint. The third, fourth, and fifth paragraphs of the complaint respectively charge three distinct and separate acts of negligence: 1. Omission to properly light the station platform; 2. Failure to render plaintiff proper directions and assistance in going to and boarding his train; and, 3. (as alleged in the fifth paragraph) "That said plaintiff was then and there [while lying on the ground after he fell], by and through the negligence of said defendants run upon and against by one of its locomotive engines," whereby he sustained injuries. We are of opinion that the negligence here alleged must be construed as a separate charge, additional to those which preceded, and does not, as defendant claims, merely refer to allegations of negligence contained in preceding paragraphs. We may add that it would seem that the parties, in the introduction of evidence on the trial, construed it that way.

Order affirmed.

COLLINS, J., absent, took no part.

RAILROADS—DUTY TO SICK OR INFIRM PASSENGERS.—A railroad company owes no enhanced duty to sick persons and persons unable to take care of themselves. Railroad cars are not traveling hospitals nor their employees nurses. It is the duty of such disabled persons to provide themselves with proper assistance while traveling in railroad cars. It is not the duty of the railroads to supply it: *New Orleans etc. R. R. Co. v. Statham*, 42 Miss. 607; 97 Am. Dec. 478, and extended note discussing whether railroads owe any special duty or care to sick, aged, or feeble passengers. The contrary doctrine to that of the above case is maintained in *Sheridan v. Brooklyn etc. R. R. Co.*, 36 N. Y. 39; 93 Am. Dec. 490, and note. If a railroad company with notice that a person is in a sick and helpless condition receives him as a passenger on one of its trains, it is answerable in damages for a failure to exercise proper care over him, whereby he is made worse: *Weightman v. Louisville etc. Ry. Co.*, 70 Miss. 563; 35 Am. St. Rep. 660, and note.

WATKINS v. LANDON.

[52 MINNESOTA, 389.]

TRADE NAME—RIGHT TO SELL UNPATENTED DRUG.—Those who have lawfully and fairly acquired a knowledge of the composition of an unpatented drug have the right to manufacture and sell it, following the formula of the inventor, and to publish, by label or otherwise, the truth, that their compound is made in accordance with that formula.

TRADE NAME, NO EXCLUSIVE PROPERTY IN, WHEN.—A person beginning to manufacture and sell an unpatented drug cannot acquire an exclusive property in the inventor's name, if it has been so long used in the market, for the purpose of designating the preparation, as to have acquired the quality of a description thereof.

Keyes and Brown, for the appellant.

Finkelburg and Lees, for the respondents.

381 DICKINSON, J. The plaintiff complains of an infringement of what he claims to be a proprietary trademark and of unfair competition in trade. The facts of the case, as determined by the trial court, may be stated as follows:

In 1856, and prior thereto, one Ward, called Dr. Ward, although he was not a physician, residing in the state of Ohio, made and sold, under the name of "Ward's Botanical Liniment," a medicinal compound, prepared in accordance with a formula or receipt owned by him. In that year he sold and imparted to one Sands the formula for making the liniment, with "the whole sole right of Minnesota territory to make and sell Ward's Liniment therein." Sands thereafter manufactured and sold the liniment in this state under the label and designation of "Dr. Ward's Celebrated Liniment." This

was continued several years until 1868, when, not voluntarily, but induced by threats of prosecution by the plaintiff, who then claimed the sole right to make and sell Ward's Liniment in this state, he changed the label on the liniment made and sold by him to "T. H. Sands' Celebrated Liniment," and under that designation he continued the manufacture and sale until February, 1889. *The preparation came to be known as "Dr. Ward's Liniment" prior to 1860, and has ever since been so known.* In 1867 the plaintiff agreed with Ward that the latter should procure his liniment to be patented, and should sell to the former the right to manufacture and sell the same in this and some other states, for which a stated consideration was to be paid. A part of the agreed consideration was then paid, and the formula was disclosed to the plaintiff. But the liniment was never patented. The plaintiff then commenced to manufacture and sell the preparation in this state under the designation of "Ward's Celebrated Liniment." Since 1870 he has manufactured and sold a liniment, the formula of which is substantially the same as that used by Ward. He has sold this under the designation of "Dr. Ward's Vegetable Anodyne Liniment," which he now claims as a trademark. By this name and designation the liniment manufactured by the plaintiff has become widely and favorably known, so that his trade therein has become profitable.

From 1870 to 1885 the defendants purchased liniment from the plaintiff in bulk, and sold it at retail, using thereon the label "Dr. Ward's Liniment, Landon and Burchard, Druggists, Plainview, Minnesota," and it came to be known that the liniment so sold by them was made by the plaintiff.

Subsequent to 1885 the defendants manufactured and sold a liniment similar to Ward's and labeled "Dr. Hoffman's Vegetable Anodyne," with their firm name added. In other respects the labels so closely resembled those used by the plaintiff that they were calculated to induce ordinary purchasers to believe that the preparation was the plaintiff's manufacture.

In 1889 Sands sold and imparted to the defendants the formula purchased by him from Ward, with the right to make and sell the same in this state. Since that time the defendants have manufactured according to that formula, and have sold the product under the label "Dr. Ward's Liniment, Landon and Burchard, Druggists, Plainview, Minnesota."

In 1890 certain persons (Batterton Brothers) purchased from Ward whatever rights he had, and in 1891 the plaintiff succeeded to the rights of such purchasers.

The court granted to the plaintiff appropriate relief as respects the use by the defendants in the future of labels resembling those of the plaintiff. The further questions presented on this appeal by the plaintiff are whether the defendants have the legal right, as against the plaintiff, to make and sell the compound according to Ward's formula, and under the name of "Dr. Ward's Liniment," and whether the evidence in this case was such as to entitle the plaintiff to recover substantial damages. It should be further stated that while the decision under review permits the defendants to use a label designating their preparation as "Dr. Ward's Liniment," they are required to add the statement that it is manufactured by them, and to avoid the use of labels resembling those of the plaintiff.

This preparation never having been patented, and Sanda, and through him, these defendants, having lawfully and fairly acquired knowledge of its composition, they have the legal right to manufacture ³⁹³ and sell it, following Ward's formula: See authorities cited below. They may, too, by label or otherwise, publish the truth, that their compound is made in accordance with Ward's formula; and this may be by a formal statement to that effect, or by more brief terms of similar import, such as those which, by the decision under review, the defendants are permitted to employ, viz., "Dr. Ward's Liniment, manufactured and sold by Landon and Burchard," etc.: *Chadwick v. Covell*, 151 Mass. 190, 192; 21 Am. St. Rep. 442; *Marshall v. Pinkham*, 52 Wis. 572; 38 Am. Rep. 756; *Massam v. J. W. Thorley's Cattle Food Co.*, L. R. 6 Ch. Div. 574; *James v. James*, L. R. 13 Eq. Cas. 421; *Singer Mfg. Co. v. Loog*, L. R. 8 App. Cas. 15, 27; *Singer Mfg. Co. v. Wilson*, L. R. 2 Ch. Div. 434, and same case on appeal, L. R. 3 App. Cas. 376, 384, 385, 398, 399. While the decision last cited reverses that preceding it upon points relating to the evidence, the principle to which we cite these authorities is recognized at the pages above given.

Even if, under other circumstances, the plaintiff might have rightfully appropriated exclusively to his own use the name of Ward as a part of a trademark or trade name, so as to have excluded others from using it, as a means of declaring the fact that the compound put forth by them was

made according to the formula of Ward, a controlling fact, to which we have called attention by the use of italics in the statement of the case, forbade his doing so in this case. This preparation had been for many years known as "Dr. Ward's Liniment," when the plaintiff commenced the use of that name in connection with the business. Sands had long rightfully made and sold it under that name, and had the right to continue to do so. He had contributed, as may be presumed, to the popular association of that name with the remedy, and to make the name peculiarly valuable to any manufacturer who might appropriate it exclusively to his own use.

The name had thus practically come to be one descriptive of this preparation, and, having acquired that quality, the plaintiff had no right to withdraw it from further use by Sands, or by any other person who might lawfully manufacture the same liniment, and appropriate ²⁹⁴ it to his exclusive use, so as to give him a practical monopoly in the sale of the preparation which he had no exclusive right to make or sell: *Canal Co. v. Clark*, 13 Wall. 311; *Stachelberg v. Ponce*, 128 U. S. 686; *Van Beil v. Prescott*, 82 N. Y. 630; *Marshall v. Pinkham*, 52 Wis. 572; 38 Am. Rep. 756.

It is of little importance that, by reason of the plaintiff's threatened prosecution of Sands, and of the inability of the latter to enter into litigation, as he testifies, Sands had discontinued the use of the name of Ward. The manufacture and sale of the liniment was continued, and it continued to be known as "Dr. Ward's Liniment" down to the time when the plaintiff sought to appropriate those words to his exclusive use. He had no right, by such an appropriation of the common name of this remedy, of established reputation, to deprive other manufacturers of the benefits of that name as properly and truly designating the article manufactured by them. Sands had the right to resume the use of the name which the plaintiff had no right to appropriate after it came to be the common name for the liniment.

There is no proof of the amount of damage which the plaintiff may have suffered from the partial resemblance to the plaintiff's label of the label formerly used by the defendants, bearing the words "Dr. Hoffman's Vegetable Anodyne," but it is contended that, even in the absence of such proof, damages should have been awarded to the extent of one hundred dollars, pursuant to Laws, 1885, chapter 178,

section 4. But it is only in cases where the person imitating the label or trademark of another does so with the fraudulent intent expressed in that section, and which is there declared to be criminal, that such a statutory penalty is recoverable. The court has not found that the defendants were actuated by a fraudulent purpose, and the evidence did not require such a conclusion; hence the plaintiff cannot prevail in this particular. The fact that the action is not for the recovery of the penalty would lead to the same conclusion.

For the reasons assigned by the learned judge of the district court as to the claim of newly discovered evidence, we do not think that he erred in his refusal to accept that as a sufficient ground for allowing a new trial.

395 We deem the findings of fact justified by the evidence. Upon some other matters referred to in the briefs comment is unnecessary.

Order affirmed.

PATENTS—RIGHT TO SELL UNPATENTED DRUG.—There can be no exclusive right to the use of formulas for the manufacture of medicines, though there may be a right to prevent any one from obtaining or using them through breach of trust or contract. Any one who honestly gets a knowledge of such formulas has the right to make and sell medicines therefrom, and to publish to the public that they are made according to such formulas: *Chadwick v. Corvell*, 151 Mass. 190; 21 Am. St. Rep. 442, and note; *Thompson v. Winchester*, 19 Pick. 214; 31 Am. Dec. 135. See the note to *Tabor v. Hoffman*, 16 Am. St. Rep. 743, where the question of property in inventions, independent of letters patent, is discussed.

WATERS v. PIONEER FUEL COMPANY.

[52 MINNESOTA, 474.]

MASTER AND SERVANT, RELATION OF, WHEN EXISTS.—A teamster hired to haul coal in his own wagon for a fuel company occupies the position of a servant, when he represents the company in all the details of the work assigned to him, and is subject to its control as long as his employment continues. Under such circumstances, it is immaterial that he is paid for his work by the load, and not by the day or hour.

MASTER AND SERVANT—TEAMSTER, WHEN ACTING WITHIN THE SCOPE OF HIS DUTIES.—When a teamster, hired to haul coal for a fuel company, has the cover of a coal-hole in a sidewalk removed for the purpose of delivering a load of coal, it is one of his duties, as a servant of the company, to see that the cover is securely replaced, or the hole otherwise protected until the occupant of the premises can attend to the matter, and if, owing to his failure to perform that duty properly, the cover gives way under a person using the sidewalk, the company is liable for the injuries thereby sustained.

Kitchel, Cohen, and Shaw, for the appellant.

A. H. Noyes and John E. Waters, for the respondent.

⁴⁷⁶ **VANDEBURGH, J.** The defendant's employee, engaged in hauling coal, delivered by its order a ton of coal to one of its customers in the city of Minneapolis. He delivered the coal through a hole in the sidewalk in front of the premises of the purchaser, into a vault or bin under the sidewalk, connected with the premises. After the coal was unloaded, he took out the chute through which it was delivered, and put the cover over the hole, but, as is alleged, failed to replace it properly; and the plaintiff, who soon after passed along, stepped upon it, and was precipitated into the hole, and injured. He brings this action against the defendant, and insists that it is a case where *respondeat superior* applies. The defendant, however, resists this claim on the ground that the person delivering the coal was not its servant, but an independent contractor.

The evidence of the nature of his employment, which is undisputed, is that he had applied to the defendant for work, and had worked for the fuel company about three months; had worked almost every day for them, delivering coal; and was paid thirty-five cents per ton for delivering it, and got his pay every week. He owned the team, and the running-gear of the wagon. The defendant furnished him the wagon-box. He was not sure of business every day, and could quit when he wanted to, though the fact that he was paid every Saturday night shows that the employment was continuous until suspended. He had not, however, quit, or been discharged, when this coal was delivered. When the order for this ton of coal came in it was delivered to him to execute, and the amount, quality, and price specified. He loaded the coal, and took it to the specified place, got ⁴⁷⁷ the money for it, and, after the coal was delivered, procured the receipt, acknowledging its delivery, and returned it and the money to the defendant.

We think this evidence shows that the person who delivered the coal was in the service of the defendant, though the term of service was precarious; and we do not see that it is material that he was paid by the load, by the hour, or by the day for his work. He represented the master in all the details of the work enumerated, and while he remained in defendant's employment he was subject to its control. If he had been at

work by the day or by the month, and had been furnished with a team and wagon by the defendant, would the circumstances of the delivery have been any different? Or would the control of the defendant over the acts of the employee have been otherwise or greater than it was? His orders were to collect the pay for the coal in advance. If it had not been so paid for he would have been obliged to have brought the coal back to the yard. The testimony shows that he had worked for the company about three months, hauling coal daily. He had in the mean time rendered service for no one else, and appeared to be subject to its orders, and was treated as one of its teamsters or drivers.

It is not easy to frame a definition of the terms "independent contractor" that will satisfactorily meet the conditions of different cases as they arise, as each case must depend so largely upon its own facts. One text-writer declares such contractor to be one who undertakes to do specific pieces of work for other persons, without submitting himself to their control in the details of the work, or one who renders the service in the course of an independent employment, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished: 1 Shearman and Redfield on Negligence, secs. 164, 165.

So it is said that an independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of the work: *Powell v. Virginia Const. Co.*, 88 Tenn. 692; 17 Am. St. Rep. 925.

The plaintiff is not concluded by these definitions. But, without ⁴⁷⁸ attempting to discuss abstract definitions, we feel satisfied that, upon the undisputed facts in the case, the court was right in holding that the relation existing between the defendant and the carrier of the coal was that of master and servant.

2. Assuming, then, that such relation existed between the teamster and the defendant in hauling and handling the coal, was he its servant in the particular matter of closing the opening in the sidewalk? Upon this matter the court instructed the jury, in substance, that it was for them to determine whether it was a part of the driver's business to replace the cover, and if it was not, then the plaintiff could not recover; but if they found that it was, and that he replaced it in a care-

less and improper manner, resulting in the injury complained of, plaintiff should recover. Whether this proposition was or was not strictly accurate, we think it sufficiently favorable to the defendant.

It was left to the jury to determine, as a question of fact, whether it was his duty, as the servant of the defendant, to replace the cover; and the evidence certainly tended to show this, and will support such a finding by the jury.

The evidence shows that the teamster brought the coal to the store, and at his request the opening was uncovered. It had to be opened from the inside. He then placed the chute into the opening, shoveled the coal into it, took out the chute, which was a sufficient protection while there, replaced the cover, and went into the store for the receipt. He represented the defendant in removing the chute and getting the receipt, and the court will not assume that his agency was temporarily suspended while he was in the act of replacing the cover. It seems to us the jury were justified in finding—if, indeed, the evidence did not require them to find—that when the defendant removed the chute, and thus left an opening in the sidewalk eminently dangerous, it was its duty to cover it properly, or otherwise protect it till the occupant of the premises could attend it. Whether an independent action might be sustained against the occupant of the store on account of the dangerous condition in which the sidewalk was left we need not inquire.

If the instruction, as given on this subject, was not as clear or ⁴⁷⁹ specific as defendant desired, it should have asked more specific instructions. No other matters need be considered.

Order affirmed.

MASTER AND SERVANT—THE RELATION, WHEN EXISTS.—This question is the subject of the monographic note to *Brown v. Smith*, 22 Am. St. Rep. 459-463. When one person lends his servant to another for a particular employment, such servant, for any thing done in that employment, must be treated as the servant of the person to whom he was lent: *Hasty v. Sears*, 157 Mass. 123; 34 Am. St. Rep. 267, and note. See *Metcalf v. Sweeney*, 17 R. I. 213; 33 Am. St. Rep. 864, and *Governor v. Withers*, 50 Am. Dec. 105.

SINGER MANUFACTURING COMPANY v. MILLER.

[52 MINNESOTA, 516.]

INNKEEPER'S LIEN, GOODS IN POSSESSION OF BOARDER, NOT SUBJECT TO.—

The fact that goods in the possession of a guest at an inn belong to a third person does not prevent the innkeeper from having a lien thereon, provided he has no notice of such ownership, but this rule has no application, where the party in possession of the goods is received as a boarder.

INNKEEPER AND GUEST, EVIDENCE INSUFFICIENT TO ESTABLISH RELATION

OF.—Evidence which merely shows that a man and his family were received as boarders and lodgers at a hotel, and continued to board and lodge there for about six months at a weekly rate, does not affirmatively establish the relation of guest and innkeeper, so as to subject the latter to the liability, or give him the rights, incident to that relation.

Fred C. Cook, for the appellant.

Wm. H. Donahue, for the respondent.

⁵¹⁷ VANDERBURGH, J. The court below found the facts as stipulated by the parties in the agreed statement of facts, as submitted, and, ⁵¹⁸ as a legal conclusion, that the plaintiff was entitled to judgment. The defendant claimed an innkeeper's lien upon the chattel in controversy, a sewing-machine, on the ground that it was brought to his hotel by a guest, who, it now appears, had contracted to purchase the same of plaintiff, but the title had not passed, though the possession had been delivered. The defendant, however, had no notice of the plaintiff's claim, and insists upon his lien thereon, with other goods of the guest, for the amount of his bill.

The plaintiff's counsel does not seriously contest the proposition that an innkeeper may have such lien on goods in the possession of his guest *infra hospitium*, though they belong to a third person, provided the innkeeper has no notice of that fact.

If the innkeeper's liability would attach in case the sewing-machine were lost or stolen, it would seem but just to hold that his lien attaches whenever there is a corresponding liability: Schouler on Bailments, sec. 292; *Manning v. Hollenbeck*, 27 Wis. 202; *Threfall v. Borwick*, L. R. 7 Q. B. 711.

The respondent, however, claims that the judgment may be supported on the ground that the findings of fact show that the party who brought the machine to defendant's hotel was received as a boarder, and remained there as such, and not as a traveler or guest. The evidence is not here, and so the question is not whether it would support a finding either

way, but whether it appears from the stipulated facts, which are adopted as the findings in the case, that he was a guest. To entitle the defendant to assert his innkeeper's lien he must have received the property as the goods of a guest, but this does not appear, and there is no such finding. It appears from the agreed statement that he received the party, his wife and two children as boarders and lodgers, and that they continued to board and lodge with him for about six months at the rate of fifteen dollars per week, and that is all. This does not affirmatively establish the relation of guest and innkeeper, so as to subject him to the liability, or give him the rights incident thereto. Error must appear.

Judgment affirmed.

INNS—"GUESTS" AND "BOARDERS"—WHO ARE, AND HOW DETERMINED.—Whether an inmate of a hotel is a guest or boarder is a question of fact to be determined by the trial court. That the plaintiff made a special arrangement respecting his sojourn is not conclusive, but is merely to be considered as a circumstance in connection with all the other evidence: *Mages v. Pacific Imp. Co.*, 98 Cal. 678; 35 Am. St. Rep. 199, and note. See further *Fay v. Pacific Imp. Co.*, 93 Cal. 253; 27 Am. St. Rep. 198, and note; *Pullman etc. Car Co. v. Lome*, 28 Neb. 239; 26 Am. St. Rep. 325; *Moore v. Long Beach Development Co.*, 87 Cal. 483; 22 Am. St. Rep. 265, and the extended notes to *Hancock v. Rand*, 46 Am. Rep. 119-121, and *McDaniels v. Robinson*, 62 Am. Dec. 586. As to who is a guest, see the notes to *Cutler v. Bonney*, 18 Am. Rep. 133, and *Pinkerton v. Woodward*, 91 Am. Dec. 670.

INNKEEPERS' LIENS.—The lien of an innkeeper on property intrusted to him to be kept depends upon the question whether it was the property of one who was a guest of such innkeeper actually or constructively: *Grinnell v. Cook*, 3 Hill, 485; 38 Am. Dec. 663, and note. An innkeeper's lien extends to property exempt from execution: *Rona v. Meier*, 47 Iowa, 607; 29 Am. Rep. 493. An innkeeper has a lien on the property of a third person held by the guest as bailee and brought within the inn, unless he knew it was not the property of the guest: *Cook v. Kane*, 13 Or. 482; 57 Am. Rep. 28, and extended note.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

**RUDDIOK v. ST. LOUIS, KEOKUK, AND NORTH-
WESTERN RAILWAY COMPANY.**

[116 MISSOURI, 28.]

DEEDS—FORFEITURE—CONDITION SUBSEQUENT.—A successor to a grantee in a deed to a railway for a right of way, containing a covenant to furnish the grantor with an annual pass, coupled with a condition that a failure to do so shall work a forfeiture of the land, takes subject to such condition.

DEEDS—FORFEITURE FOR CONDITION BROKEN—RE-ENTRY.—A grantor or his grantee can maintain ejectment against the grantee or his grantees, for a breach of an express condition of forfeiture in a deed, without re-entry upon the land, or an express reservation of a right of entry in the deed.

DEEDS—FORFEITURE FOR CONDITION BROKEN—REMEDY—MEASURE OF DAMAGES.—If a railroad company has entered under a deed of a right of way containing a covenant to furnish the grantor with an annual pass, coupled with a condition that a failure to furnish such pass shall work a forfeiture of the land, a subsequent breach of the condition will not sustain an action by the grantor for damages for the taking of the land for a right of way, and for injuries to his whole tract. His remedy is either an action for damages for failure to furnish such pass, or ejectment for forfeiture on condition broken, in which latter action he is entitled to rent for the use of the roadbed from the time of such breach.

James H. Anderson, H. H. Trimble, Palmer Trimble, and Blair and Marchand, for the appellants.

Craig, McCrary and Craig, and F. T. Hughes, and T. L. Montgomery, for the respondent.

28 BURGESS, J. This is an action at law tried by a jury. The case is that plaintiff was the owner of a large tract of land lying in a body, partly in the county of Clark and partly

in the county of Lewis, in the state of Missouri. On the tenth day of July, 1872, he conveyed ²⁹ to the Mississippi Valley and Western Railway Company a right of way over certain of this land in Clark county, for the consideration of one dollar in money and an agreement on the part of the railway company, incorporated in the deed, to furnish the plaintiff with an annual pass during the period of his natural life, over the company's railway from the city of Keokuk to the city of Quincy, and in case such pass is not given, or if it shall be revoked, then said deed to be void.

And in 1879 the plaintiff by another deed, his wife, Mattie Ruddick, joining with him, conveyed to the defendant company a right of way over certain of his lands lying in the county of Lewis for the consideration of "a certain and continuous pass granted to said Mattie Ruddick and family over said St. Louis, Keokuk, and Northwestern Railway, and it is agreed that if said pass is refused or withheld by the company now operating said railway, or their successors, then said strip of land to revert back to said grantors and this deed to be void."

In 1875 the property and franchises of the railway company were sold to foreclose a mortgage, under a decree of the circuit court of the United States and one Stone became the purchaser of the mortgage sale. Soon thereafter Stone sold the railroad property and franchises to the defendant, which is a railroad corporation organized under the laws of Missouri, and also under the laws of Iowa. The agents of the defendant recognized plaintiff's claim to his annual pass until the expiration of the year 1883, and to January 29, 1884, when they declined to issue to him any further. The defendants also recognized the claim of plaintiff's wife, Mattie Ruddick and her family to an annual pass until the fourteenth day of January, 1887, when it declined to issue it any further. Upon these facts the plaintiff prosecutes his suit upon the ground that the land ³⁰ described in the deeds (which were duly recorded in the counties in which the different described tracts of land lie) upon failure to comply with the conditions in the deeds defendant forfeited the land, and seeks to recover the value to his entire tract, by reason of the taking and occupancy of the strip through the same for track and right of way. There are two different counts in the petition, one bottomed on the breaches of the conditions of the deed to the Clark county, and the other on the breaches of the conditions

of the deed to the Lewis county land. The damages were assessed as a whole, at the sum of three thousand six hundred and eighteen dollars.

The usual motion for new trial and in arrest being filed and overruled, the case is appealed to this court.

The deeds from the plaintiff to the different railroad companies both contain substantially the same conditions in regard to forfeiture on failure to furnish annual passes according to the terms of the deeds. The passes were furnished for quite a number of years, and finally refused by defendant, who succeeded by purchase to the rights and franchises of the Mississippi Valley and Western Railroad Company, and also to the rights and franchises of the St. Louis, Keokuk, and Northwestern Railway Company, and, if the covenants in the deeds were not coupled with the conditions and provision for forfeiture for failure to furnish the passes, they would not run with the land and would not be binding on defendant. The covenant would not run with the land because foreign to, independent of, and not in any manner connected with it. Only such covenants and conditions as are connected with, or requiring something to be done on or about the land itself run with it: *Wiggins Ferry Co. v. Chicago etc. R. R. Co.* 73 Mo. 389; 39 Am. Rep. 519; *Kentucky Cent. R. R. Co., v. Kenney*, 82 Ky. 154; *Gulf etc. Ry. Co. v. Smith*, 72 Tex. 122; ²¹ *Georgia etc. R. R. Co. v. Reeves*, 64 Ga. 492; *Lydick v. Baltimore etc. R. R. Co.*, 17 W. Va. 427.

But as the covenants in both deeds are covenants with the subsequent condition of forfeiture upon failure or refusal to furnish passes as provided in the one for plaintiff and in the other for his wife and family as provided in them, and as therein expressly set forth, defendant as the successor by purchase to the grantees in those deeds, took subject to all the conditions in said deeds, and is bound thereby as if it were the original grantee.

At common law it was necessary for the grantor to enter upon the land conveyed in order to work a forfeiture. It could not be effected by bringing an action for the recovery of the possession. This rule has been somewhat changed, so that at the present time the ordinary action of ejectment would have the same effect as the common-law entry. The right of entry need not be expressly reserved where the condition is express. It follows as a necessary incident to the condition, and passes with the land, into whosoever hands it may

come: Tiedeman on Real Property, sec. 277; *Osgood v. Abbott*, 58 Me. 73; *Jackson v. Allen*, 3 Cow. 220; *Bowen v. Bowen*, 18 Conn. 535; *Gray v. Blanchard*, 8 Pick. 284; *Fonda v. Sage*, 46 Barb. 109.

It has also been held, if several parcels of land are conveyed upon condition by the same deed, or are embraced in the same mortgage, and are all situate in the same county, an entry upon one in the name of the whole will be sufficient to enforce the condition as to all of the parcels. But if there be different deeds of the parcels, with different conditions therein, the entry must be made upon each: 2 Washburn on Real Property, sec. 16, p. 18.

It does not necessarily follow, however, that because of the forfeiture of the land occupied by defendant ²² under those deeds as a right of way and the reversion thereof to plaintiff because of the conditions broken on account of the refusal by defendant to furnish the passes, that plaintiff can maintain this action for the damages he claims to have sustained by reason of the construction of defendant's road through his tract of land. The right of way was taken, the road built and operated for nearly twenty years by and with his knowledge and consent and by the right and authority conferred by the deeds from plaintiff, which were read in evidence. The entry, therefore, was lawful. There has never been an entry by plaintiff for condition broken, nor has he ever proceeded to have the forfeiture declared by any proceeding in a court of law or equity. He is not simply, because of the forfeiture, in contemplation of law or in fact in possession of the land granted by him to the railroad companies, and cannot maintain his suit for damages to his tract of land, or any part of it conveyed by the deeds, which is now, and was at the time of the commencement of this action, in the admitted possession and occupancy of defendant.

If, in the first place, the entry by the railroad company had been without authority and against the will and consent of plaintiff, a different rule would obtain, because in such case the entry on his lands and the appropriation of a portion of it by the railroad company to its own use would have been unlawful. Plaintiff should have entered for condition broken, or prosecuted his action to final judgment for that purpose, before instituting this proceeding, if at all. But in that event the measure of damages would not be that which the entire tract of land sustained by reason of the construction

of the road, but would be the rental value of the right of way, taken and occupied by ²³ defendant from the time of the entry for condition broken, up to the commencement of the suit.

The rule of law which entitles those whose lands are taken and condemned for railroad purposes, by virtue of the right of eminent domain, to damages done to the entire tract by reason of the taking of a portion thereof, does not apply to cases like the one at bar, where the right of way was in the first place conveyed by deed. Upon the execution by plaintiff of the deeds, the title to the strip of land embraced therein vested in the grantees, subject to be defeated by failure on their parts to comply with the conditions expressed in the deeds, that is, to furnish in the one case a pass to plaintiff, and in the other to plaintiff's wife and family. Upon condition broken, and entry for reason thereof, the title would revert to and become reinstated in plaintiff, but until such entry is made it will remain in defendant. But even if he had entered for condition broken, he could not maintain an action for damages for the land thus taken and also to his entire tract by reason of such taking, because the deeds as soon as executed passed the title to the right of way from plaintiff to the grantees, and the road constructed and put in operation by virtue of the authority conferred thereby. And, upon entry for condition broken, he could get nothing more than was conveyed by the deeds, which was the strip of ground occupied by defendant for its right of way. He would acquire no right to sue for damages for the taking of his land for roadbed, and by reason thereof to his entire body of land.

Plaintiff misconceived his cause of action, which occurs to us is either an action against the original grantees in the deeds for damages for failure to furnish the passes, as held in the case of *Helton v. St. Louis etc. Ry. Co.*, ²⁴ 25 Mo. App. 322, and also in the case of *Erie etc. Ry. Co. v. Douthet*, 88 Pa. St. 243, 32 Am. Rep. 451, or ejectment for condition broken which would entitle him to rent for the use of the roadbed from the time of such entry. Under no circumstances can he recover in this form of action. He will not now be heard to complain of that to which he assented, and that too by his solemn deeds.

When a railroad is constructed by and with the consent of the landowner over whose land it is located, evidenced by deed or contract with subsequent condition, ejectment will not lie: *McClellan v. St. Louis etc. R. R. Co.*, 103 Mo. 295; *Mar-*

erson v. West End etc. R. R. Co., 72 Mo. 342; *Hubbard v. Kansas City etc. R. R. Co.*, 63 Mo. 68. But when the deed contains a condition for forfeiture, which broken, ejectment for possession will lie.

All the instructions given by the court should have been refused, and the motion in arrest sustained, because the petition states no cause of action. As this disposes of the case, it is thought to be unnecessary to advert to the many other questions raised by counsel for appellant in their briefs. The cause is reversed.

All concur.

DEEDS—CONDITIONS SUBSEQUENT—FORFEITURE FOR BREACH.—This question is thoroughly treated in the monographic note to *Cross v. Carson*, 44 Am. Dec. 743. See, also, the note to *Post v. Weil*, 12 Am. St. Rep. 819. The failure of a grantee to perform certain conditions subsequent which were part of the consideration for a conveyance does not work a forfeiture where the failure is due to the acts of the grantors or their successors in interest: *Butts v. Robson*, 5 Wash. 268.

DEEDS—FORFEITURE FOR BREACH OF CONDITION SUBSEQUENT—HOW EFFECTED.—Entry for condition broken is required of the grantor to make good the forfeiture, or he or his heirs may maintain ejectment: *O'Brien v. Wagner*, 94 Mo. 93; 4 Am. St. Rep. 362, and note. Upon breach of a condition subsequent in a deed, the party entitled may re-enter, or, if necessary, maintain an action to regain his estate: *Raley v. Umatilla County*, 15 Or. 172; 3 Am. St. Rep. 142, and note. An estate on condition subsequent does not revert until entry for breach of the condition: *Thompson v. Thompson*, 9 Ind. 323; 68 Am. Dec. 638, and note.

DAMAGES FOR BREACH OF CONDITION SUBSEQUENT IN DEED: See *Leach v. Leach*, 4 Ind. 628; 58 Am. Dec. 642.

CONNELL v. WESTERN UNION TELEGRAPH COMPANY.

[116 MISSOURI, 34.]

DAMAGES—MENTAL ANGUISH AS AN ELEMENT OF.—A telegraph company is not liable for mental suffering and pain resulting from its neglect to transmit a message promptly, although advised by the contents of the message that such suffering and pain will naturally result from its failure to deliver the message without delay.

MENTAL SUFFERING UNCONNECTED WITH ANY PHYSICAL INJURY is not sufficient to sustain an action for damages for breach of contract.

William S. Shirk, for the appellant.

Karnes, Holmes, and Krauthoff, and Charles E. Yeater and G. H. Fearons, for the respondent.

87 GANNT, P. J. This is an action for damages for the negligence of defendant in failing to deliver to plaintiff the following telegraphic message sent to him by his wife:

SEDALIA, MISSOURI, December 18, 1889.

"To Matt Connell, Soldiers' Home, Leavenworth, Kansas:

"Your child is dying.

"MARY."

88 The plaintiff alleged that his wife paid the customary charge, fifty cents, for its transmission, and that he had refunded that sum to her.

Plaintiff then alleges that his child died on the twenty-fourth day of December, 1889, "and that if said message had been transmitted and delivered with any degree of diligence or promptness whatever he would have been able to be present with his said child during its last sickness and at its death; and that by reason of the great negligence and carelessness of defendant in failing to deliver said message, and of his being thereby deprived of being with his said child during its last sickness and at its death, he lost not only the fifty cents paid for sending said message, but also suffered great anguish, and pain of mind and body, and was physically and mentally prostrated when he learned that his child had died and been buried without knowledge on his part of its sickness and death."

He alleges that he was an inmate of the Soldiers' Home from December 18, 1889, continuously, till February 21, 1890, and by the slightest diligence he could have been found. He alleges further that he is damaged in the sum of five thousand dollars, for which he prays judgment.

On motion of defendant, the circuit court struck out of the petition the words: "But also suffered great anguish, and pain of mind and body, and was physically and mentally prostrated when he learned that his child had died and had been buried without knowledge on his part of its sickness and death." This left the action pending for the fifty cents only, and, plaintiff declining to amend, the court sustained another motion to dismiss for want of jurisdiction of the subject matter of the action.

The sole question discussed by the appellant in this case is this: "Where a telegraph company is **89** advised by the contents of a message that great mental suffering and pain will naturally result from its neglect to transmit and deliver the message promptly, can damages be recovered by the

sendee for such mental agony and distress, caused by a failure to promptly transmit and deliver?"

The proposition, it will be observed, relates simply to damages arising from a breach of contract.

Prior to this time there has been but one opinion expressed in the decisions of this court, and that is clearly adverse to the contention of the appellant, and this is not questioned by the able counsel who represents the appellant, but he urges that inasmuch as telegraphy is of comparatively recent origin we should, in view of the function it performs, make an exception in the construction of the contracts made by those engaged in it and the damages which flow from a breach thereof. That an action for mental anguish disconnected with physical injury, for the breach of a contract, could not be maintained at common law, with the single exception of the breach of a marriage contract, we think is abundantly established: *Wood's Mayne on Damages*, 75; *Lynch v. Knight*, 9 H. L. Cas. 577; *Walsh v. Chicago etc. Ry. Co.*, 42 Wis. 23; 24 Am. Rep. 376; *Wyman v. Leavitt*, 71 Me. 227; 36 Am. 303.

The subject came under review in this court in *Trigg v. St. Louis etc. Ry. Co.*, 74 Mo. 147, 41 Am. Rep. 305. In that case, a lady, with two little children, was carried beyond the station to which she was traveling. It was not claimed that any indignity was offered, or that she suffered personal injury. The trial court instructed that the jury might award her damages for the anxiety and suspense of mind suffered in consequence of the delay in reaching her destination. This court, in reversing the cause, said: "The instruction as to ⁴⁰ the measure of damages was erroneous. Neither the anxiety and suspense of mind suffered by the plaintiff in consequence of the delay, nor the effect upon her health, nor the danger to which she was exposed in consequence of the train being stopped an insufficient length of time, were proper elements of damage in this case, as no personal injury was received by the plaintiff and no circumstances of aggravation attended the wrongful act complained of. If the anxiety and suspense of mind suffered by the plaintiff in consequence of the delay in this case is a ground of recovery, similar suspense and anxiety of mind would be an equally good ground of recovery in a case where a railroad train should wrongfully stop to take on a passenger. The general rule is that 'pain of mind, when connected with bodily

injury, is the subject of damages; but it must be so connected in order to be included in the estimate, unless the injury is accompanied by circumstances of malice, insult, or inhumanity": Citing *Pierce on Railroads* [Ed. 1881] 302; *Indianapolis etc. Ry. Co. v. Birney*, 71 Ill. 391.

The authority of this case has never been questioned by the courts of this state, to our knowledge. The rule announced was in strict harmony with that of the courts of last resort in our sister states, until in 1881 the supreme court of Texas, in *So Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805, announced the doctrine that the sender of a social telegram could recover for the mental anguish caused by delay in its delivery.

The authorities relied upon by the supreme court of Texas in that case were actions for physical injuries in which the mental agony formed an inseparable part, a doctrine never questioned in this state since *Porter v. Hannibal etc. R. R. Co.*, 71 Mo. 66, 36 Am. Rep. 454. The learned commissioner who prepared the opinion did quote a suggestion of the authors of *Shearman and Redfield* on ⁴¹ Negligence to the effect, that they thought such an action ought to lie, but they did not claim that any court in this country or England had previously sustained their view. The Texas case has been followed in that state in a great number of cases, and has been adopted in Indiana, North Carolina, Kentucky, Alabama, and Tennessee.

On the other hand, this new departure has been vigorously assailed and denied by the supreme courts of Mississippi, Georgia, Kansas, and in Dakota, and in a most luminous dissenting opinion by Judge Lurton of the supreme court of Tennessee, now judge of the United States circuit court for the sixth circuit, in which Folkes, judge, concurred. The majority of the supreme court of Tennessee do not go to the length contended for by the appellant here. The majority lay great stress upon the fact that by virtue of a statute in Tennessee, a cause of action is given to the aggrieved party for damages for failure to deliver any message. Hence they argue that as the party has the right to some damages by virtue of the statute, they conclude they may add the anguish of mind as an element. It is impossible to escape the feeling that the very able judges were resorting to a fiction to justify them in supporting the action. The case of *So Relle v. Western Union Tel. Co.*, 55 Tex. 310, 40 Am. Rep. 805, has been

nowhere more flatly repudiated than by the supreme court of Texas itself in *Gulf etc. Ry. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278.

Judge Stayton, in an able and lucid discussion of the authorities, demonstrates that "the cases in which damages have been allowed for mental distress was the incident to a bodily injury suffered by the distressed person, or cases of injury to reputation or property in which pecuniary damage was shown, or the act such that the law presumes some damage, however slight, from the act complained of. They are not cases in ⁴² which the bodily injury or other wrong was suffered by one person and the mental distress by another."

The reasoning of the supreme court of Tennessee that because the code gave an action for some damages that opened the way to add damages for mental distress, is, we think, at complete variance with our own decisions. In this state we have a damage act which gives a right of action where death has resulted, and similar statutes exist in most of the states.

The construction placed upon these statutes has been that no relative, save those named in the statute, can recover at all, and no recovery as a *solatium* for mutual suffering is allowed where not expressly given by the statute: *Field on Damages*, 498; *Porter v. Hannibal etc. R. R. Co.*, 71 Mo. 66; 36 Am. Rep. 454; *Parsons v. Missouri Pac. Ry. Co.*, 94 Mo. 286; *Schaub v. Hannibal etc. R. R. Co.*, 106 Mo. 74.

But it is said damages for injury to the feelings have always been allowed in actions founded upon a breach of promise to marry, and this is true in this as in other states: *Wilbur v. Johnson*, 58 Mo. 600; *Bird v. Thompson*, 96 Mo. 424; but it has always been regarded as an exception to the rule. In this action plaintiff's pecuniary loss forms an important element. The action is of common-law origin, and at common law the husband on marriage became liable for the wife's debts, and for support in a manner and style commensurate with his own social standing, and evidence of his station in life and financial condition has always been admitted: *Wilbur v. Johnson*, 58 Mo. 600. As was well said by Cooper, judge, in *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 24 Am. St. Rep. 300, "this action, though in form one for the breach of contract, partakes in several features of the characteristics of an action for the willful tort, and though the damages recoverable for the plaintiff for mental suffering are spoken of as compensatory, the fervent language of the courts indicate how

shadowy is the ⁴³ line that separates them from those strictly pecuniary": *Harrison v. Swift*, 18 Allen, 144; *Kurtz v. Frank*, 76 Ind. 595; 40 Am. Rep. 275; *Thorn v. Knapp*, 42 N. Y. 475; 1 Am. Rep. 561; *Coryell v. Colbaugh*, 1 N. J. L. 77; 1 Am. Dec. 192; "especially those cases in which evidence of seduction is admitted to ascertain the damages."

"So much, indeed, does the motive of the defendant enter into the question of damages, that, in *Johnson v. Jenkins*, 24 N. Y. 252, he (the defendant) was permitted to give in evidence in mitigation of damages, the fact that he refused to consummate the marriage because of the settled opposition of his mother, who was in infirm health."

These considerations sufficiently indicate the reasons that actuated the courts to make this exception. Few precedents for this action will be found where the defendant was impetunious. The learned counsel has collected various other cases in which mental anguish was recognized as an element of damage, and concludes with the query, if allowed in these, why not in this action?

Let us consider these in the order of his brief.

Assault and battery. Under this head is cited the case of *Craker v. Chicago etc Ry. Co.*, 36 Wis. 657; 17 Am. Rep. 504. In that case the conductor of a train seized upon the moment when the other employees were absent from the car, to take improper liberties with a lady passenger, the evidence showing that he placed his arm around her and, against her vehement protests, kissed her. It was a clear physical violation of her person, which the courts have ever held constituted an assault and battery, and actionable. The law redresses such wrong in its initial stages. The protection of the person has ever been an object of great solicitude to the common law. The present ability of actual violence often justifies recourse to extreme measures in preventing a consummation ⁴⁴ of threatened wrong to the person. The cases cited under this head clearly add no weight to plaintiff's claim.

The cases of malicious prosecution and false imprisonment come under that general class of willful wrong to the person, affecting the liberty, character, reputation, personal security, and domestic relations.

Judge Lumpkin, in *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 30 Am. St. Rep. 183, disposes of the argument attempted to be drawn from this class, as follows: "In an action for wrongful attachment, on the ground that the de-

defendant was about to dispose of his property with intent to deprive his creditors, it was held (by a divided court) that the mortification was a part of the actual damages: *Byrne v. Gardner*, 83 La. Ann. 6. Of course it was a case of serious injury to the plaintiff's business standing, and therefore, even if sound, is no authority on the present question. In an action for false imprisonment, or for malicious arrest and prosecution, mental anguish has been held a proper subject for compensatory damages: *Fisher v. Hamilton*, 49 Ind. 841; *Stewart v. Maddox*, 63 Ind. 51; *Coleman v. Allen*, 79 Ga. 637; 11 Am. St. Rep. 449. Of course such injuries are essentially willful, and, besides, are violations of the great right of personal security or personal liberty."

As to the action of seduction, every lawyer knows that proof of some service by the daughter has been invariably required to sustain it, and the same rule is rigidly adhered to in *Mages v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 841, to which we are cited by counsel, for the forcible abduction of a daughter.

In the case of enticing away a daughter, we are referred to *Stowe v. Heywood*, 7 Allen, 118. The court permitted damages for mental suffering on the express ground, that it was a willful injury, and declined to say ⁴⁵ whether such damages could ever be recovered for negligence alone, as in the case at bar. This case illustrates the greatest difficulty in estimating damages for mental suffering. Judge Metcalf says: "Mental suffering . . . cannot be measured aright by outward manifestations; for there may be a show of great distress where little or none is felt. And great distress may be concealed and borne in silence with an apparently quiet mind. *Ab in quieto sæpe simulatur quies.*"

"And we nowhere find that any other evidence of mental suffering besides that of the injury which was the alleged cause of action, was ever before admitted." The court reversed the case because the trial court permitted evidence tending to show plaintiff suffered from pain and anxiety of mind.

It is hardly necessary to add that in a case of libel or slander, if the words are not actionable *per se*, special damages must be alleged and proved. When they are actionable *per se*, they are construed, because of their evident tendency to degrade the citizen in the estimation of his neighbors, and in both cases they are malicious.

We have now gone through the list, and we find in none of them any reason for adopting the rule that for the mere negligent failure to comply with a contract, damages may be recovered on the sole ground of injured feelings when the plaintiff has suffered no physical injury. The law up to this time has essayed to protect the person and property of the individual. All the cases cited are based upon this principle. Reputation is included in the person: *Johnson v. Bradstreet Co.*, 87 Ga. 79.

The damages claimed in this action cannot be allowed as exemplary damages. The Texas court in one case did so hold, but afterwards repudiated it: *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 59 Am. Rep. 623.

46 But we do not think that the courts of England and of this country prior to 1881 were rejecting actions like this on a mere arbitrary assumption unsustained by reason. A doctrine which has passed so long unchallenged by the great jurists who have adorned the bench of our state and federal courts is not to be lightly discarded at the behest of ingenious and able counsel.

The law is and ought to be more stable than this. It has long been the boast of common-law writers that the common law was a system founded upon reason, and one of its maxims has ever been that when the reason upon which a law was based ceased the law itself ceased. Speaking for ourselves, we are satisfied that the common law denying an action for mental distress alone was founded upon the best of reason and an enlightened public policy.

And we question if the real reasons were ever more clearly and satisfactorily stated than by Judge Lurton, which we adopt:

“The reason why an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely upon physical and nervous condition, the suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated or even approximately measured. Easily simulated and impossible to disprove, it falls within all the objections to speculative damages, which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascer-

tained and assessed by a jury with justness, not by way of punishment ⁴⁷ to the defendant, but as mere compensation to the plaintiff, is not to be expected.

That the grief natural to the death of a loved relative shall be separated from the added grief and anguish resulting from delayed information of such mortal illness or death, and compensation given for the latter only, is the task imposed by the law, as determined by the majority. . . . It is legitimate to consider the evils to which such a precedent logically leads. Upon what sound legal considerations can this court refuse to award damages for injury to the feelings, mental distress, and humiliation where such injury results from the breach of any contract? Take the case of a debtor who agrees to return the money borrowed on a certain day, who breaches his agreement willfully, with knowledge that such breach on his part will probably result in the financial ruin and dishonor of his disappointed creditor. Why shall not such a debtor, in addition to the debt and the interest, also compensate his creditor for this ruin, or at least for his mental sufferings? . . . Upon what principle can we longer refuse to entertain an action for injured feelings consequent upon the use of abusive and defamatory language not charging a crime or resulting in special pecuniary damages? Mental distress is or may be in some cases as real as bodily pain, and it as certainly results from language not amounting to an imputation of crime, yet such actions have always been dismissed as not authorized by the law as it has come down to us, and as it has been for all time administered."

Why, if this rule is to become the law of this state in regard to this contract, shall it not apply to all disappointments and mental sufferings caused by delays in railroad trains? Telegraph companies are common carriers, so are railroad companies, and yet this court, in the Trigg case, held the company not liable ⁴⁸ for mental anguish as an independent cause of action for a mere act of negligence.

A similar conclusion was also reached in the United States circuit court for the fourth circuit in *Wilcox v. Richmond etc. R. R. Co.*, 52 Fed. Rep. 264, where the plaintiff made a special contract for a train to take him to the bedside of a sick parent. The court held that the trouble of mind caused by the delay at a railroad station could not be made the basis of an action, saying: "But we know of no decided case which holds that mental pain alone, unattended by injury to the

person, caused by simple negligence, can sustain an action. The plaintiff was the subject of two mental pains, one for the condition of the sick person, the other, from the delay at the station, the latter only being the subject of this action. "It cannot be pretended that damages from the latter cause of 'anxiety' and 'suspense,' uncertain, indefinite, undefinable, unascertainable, dependent so largely on the peculiar temperament of the person suffering the delay, was in the contemplation of the defendant when it entered into the contract": *Griffin v. Colver*, 16 N. Y. 489; 69 Am. Dec. 718; *Western Union Tel. Co. v. Hall*, 124 U. S. 444. But, as before said, if we establish the rule as to one common carrier or private person, with what sort of consistency can we refuse to extend it to all? The courts of Texas have already spoken of a similar case as "intolerable litigation."

We see no reason for making this innovation or exception. The legislature has imposed a penalty for each infraction of its duty in delaying a message, and it seems very clear to us that if it is to become the policy of the state to adopt this new rule the legislature, and not this court, should do it.

The common law has always attempted to deal with the citizen and his rights and wrongs in a practical ⁴⁹ way, and the declared object of awarding damages is to give compensation for pecuniary loss. The right in a civil action to inflict punishment by way of punitive damages has been ably controverted. The allowance of damages for wounded feelings, when they are the concomitant or result of a physical injury, is placed rightfully on the ground that the mind is as much a part of the body as the bones and muscles, and an injury to the body included the whole, and its effects were not separable, but the experience of every judge and lawyer teaches him how unsatisfactory in these personal injury cases are the verdicts of juries. They are utterly inconsistent, and the courts do not attempt to justify these inconsistencies upon any other theory than that it is the sole province of the jury to fix the amount. The result is that in nearly every appeal that reaches this court, one ground for reversal is the excessive damage awarded. And the right of this court to interfere at all on this ground is seriously challenged. It is no uncommon thing to have the appellee voluntarily enter a *remittitur* to save his verdict from the charge of passion or prejudice.

Under the circumstances is it wise to venture upon the far more speculative field of mental anguish without guide and

without compass? We think not. We have examined the cases in the courts of Kentucky, Indiana, Tennessee, Alabama, and North Carolina. They are all based upon the case of *So Rella v. Western Union Tel. Co.*, 55 Tex. 310; 40 Am. Rep. 805; which we have shown stands upon no previous adjudication, but is opposed by the case of *Gulf etc. Ry. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278, which to our minds completely refutes it. The cases holding this view are *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 59 Am. Rep. 623; *Gulf etc. Ry. Co. v. Wilson*, 69 Tex. 739; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; 13 Am. St. Rep. 843; *Western Union Tel. Co. v. Simpson*, 73 Tex. 423; *Western Union Tel. Co. v. Adams*, 75 Tex. 531; 16 Am. St. Rep. 920; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864; *Reese v. Western Union Tel. Co.*, 123 Ind. 294; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; 18 Am. St. Rep. 148; *Thompson v. Western Union Tel. Co.*, 106 N. C. 549; *Chapman v. Western Union Tel. Co.*, 90 Ky. 265; *Young v. Western Union Tel. Co.*, 107 N. C. 370; 22 Am. St. Rep. 883; Thompson on Electricity, sec. 378, and cases cited.

The cases opposing this view are notably the dissenting opinion of Judge Lurton in 86 Tenn. 695; 6 Am. St. Rep. 864; *Chapman v. Western Union Tel. Co.*, 88 Ga. 763; 30 Am. St. Rep. 183, in which Judge Lumpkin of the supreme court of Georgia reviews all the cases in a most admirable tone and with great clearness: *Wilcox v. Richmond etc. R. R. Co.*, 52 Fed. Rep. 264; *Crawson v. Western Union Tel. Co.* 47 Fed. Rep. 544; *Chase v. Western Union Tel. Co.*, 44 Fed. Rep. 554, where all the authorities are cited: *West v. Western Union Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530; *Russell v. Western Union Tel. Co.*, 3 Dak. 315; *Western Union Tel. Co. v. Rogers*, 68 Miss. 748; 24 Am. St. Rep. 300; *Lynch v. Knight*, 9 H. L. Cas. 577; *Victoria's Railway Commrs. v. Coultas*, L. R. 13 App. Cas. 222; *Tyler v. Western Union Tel. Co.*, 54 Fed. Rep. 634; *Kester v. Western Union Tel. Co.*, Taft, judge, 55 Fed. Rep. 603.

We are fully aware that the plaintiff's claim appeals strongly to the sensibilities, but to adopt that view we must either be guilty of adopting one rule of damages for one class of common carriers, and the breach of their contracts, or we must conclude that all of our predecessors in the great common-law courts were at fault, and henceforth repudiate not

only their utterances but our own on this subject, and this we have no inclination to do. We prefer to travel yet awhile *super antiquas vias*.

If, in the evolution of society and the law, this innovation should be deemed necessary, the legislature can be safely trusted to introduce it, with those limitations and safeguards which will be absolutely necessary ⁵¹ judging from the variety of cases that have sprung up since the promulgation of the Texas case.

Our conclusion is, the judgment should be and is affirmed.—All concur.

TELEGRAPH COMPANIES—DAMAGES, MENTAL ANGUISH.—This question is discussed in *Western Union Tel. Co. v. Carter*, 85 Tex. 580, 34 Am. St. Rep. 826, and note, with the cases collected.

DAMAGES FOR MENTAL ANGUISH—PHYSICAL INJURY.—Damages for mental anguish alone cannot be recovered in any case: *Chapman v. Western Union Tel. Co.*, 88 Ga. 763; 30 Am. St. Rep. 183; note to *Ewing v. Pittsburgh etc. Ry. Co.*, 30 Am. St. Rep. 711, 712. For delay in delivering a message by a telegraph company, damages cannot be recovered for mere mental suffering, disconnected from physical injury and not the result of willful wrong: *Western Union Tel. Co. v. Rogers*, 68 Miss. 748; 24 Am. St. Rep. 300, and note; *Thompson v. Western Union Tel. Co.*, 106 N. C. 549; *Western Union Tel. Co. v. Wilson*, 93 Ala. 32; 30 Am. St. Rep. 23. The contrary doctrine is maintained in *Western Union Tel. Co. v. Nations*, 82 Tex. 539; 27 Am. St. Rep. 914, and note.

RILEY v. VAUGHAN.

[116 MISSOURI, 189.]

HUSBAND AND WIFE—INDEBTEDNESS BETWEEN.—The reception and use by a husband in his business of the proceeds of his wife's land implies a promise to repay her, and, as between them, creates a valid indebtedness.

HUSBAND AND WIFE—RIGHT TO PREFER WIFE AS CREDITOR.—A husband in failing circumstances, who owes a debt to his wife, may prefer her as a creditor to the exclusion of others, and a transfer of property made by him to her for this purpose in good faith, without fraud on his part, or if with such fraud, without participation therein by her, must be upheld.

HUSBAND AND WIFE—FRAUDULENT CONVEYANCES BETWEEN.—A wife who gives her husband unlimited control of her property and money, and permits him to invest it in his own business for a series of years, is not, in case of his insolvency, permitted to shield his property from the just claims of persons who, in good faith, have given the husband credit in reliance upon his ownership. In such case a conveyance of property by the husband to the wife is fraudulent and void as to his creditors.

William Henry, and Porter and Woodson, for the appellant.

Riley and Hall, John A. Cross, and James P. Thomas, for the respondents.

173 MACFARLANE, J. This is a suit in equity in the nature of a creditor's bill, brought by plaintiff as trustees for the creditors of Josiah Vaughan to set aside certain conveyances of real estate made to defendant Mary E. Vaughan by third persons, on the ground that the consideration was paid by the husband, and the deeds made to the wife, for the purpose of hindering, delaying, and defrauding said creditors.

The petition charges defendant, Josiah Vaughan, being indebted to divers persons, naming them, and the respective amounts due them, which aggregate \$4,041.25, and being then also the owner of a large stock of merchandise in the city of Plattsburg, Missouri, did, about the — day of August, 1889, with intent to hinder, delay, and defraud said creditors, transfer and deliver the same to Bohart and Goff in exchange for certain real estate (which is described), consisting of a residence, business house, and some lots in the town of Lathrop, and with like fraudulent intent caused the same to be conveyed to his wife, defendant, Mary E. Vaughan; that said creditors had obtained judgments against said Vaughan, and caused said land to be sold under executions issued thereon, which was purchased by plaintiff, and is now held by him under deeds from the sheriff in trust for said creditors. A decree setting aside said conveyances, and vesting the legal title of the land in plaintiff, was prayed. The answer was a general denial.

174 The undisputed facts are, in substance, as follows: Defendants were married in the state of Illinois in 1875. The wife, at the time, was the owner, by inheritance, of 70 acres of land in that state. The husband was then a farmer, and owned two horses given to him by his father. In the fall of 1876 the husband borrowed \$500 or \$600, and bought a small stock of groceries. The borrowed money was paid by sale of the horses, and from proceeds of wheat and corn raised on his wife's land. He sold out his business in 1878, and "came out about even." During the following year he had no regular business, lived in town, and "worked round at one thing and another." About the end of the year he commenced business in another town on a capital of \$500 or \$600. Continued in this business until the winter of 1880,

and in 1881 sold out. Had lost money. Had possibly \$300 left after paying debts. In 1881 the land of the wife was mortgaged for \$1,000. This money the husband received. In 1884 a mortgage for \$2,100 was put upon the land, and the prior mortgage was paid and the husband received the remainder. At this time they moved to Kansas, and the husband invested the money in the purchase of real estate in his own name. In 1887 the wife's land was sold for \$3,500, and the proceeds, after paying the \$2,100 mortgage, was paid to the husband. The husband remained in Kansas, part of the time dealing in real estate, a short time merchandising, from 1884 to 1888. In November, 1888, he traded a tract of land, held in his own name, for a stock of merchandise in Plattsburg, valued at about \$6,500, giving notes for the difference, \$2,000. August 1, 1889, he had become indebted to wholesale merchants for goods to the amount of \$4,041.25. Finding himself in failing circumstances at this time, he traded the stock of goods to Bohart and Goff for the residence, ¹⁷⁵ business house, and some lots in Lathrop, a tract of 80 acres of farm land, and \$1,500 cash. The business house was valued at \$2,400, the residence at \$1,200, the equity in the farm land at \$1,200. By direction of the husband, the conveyance of all the property was made to the wife.

The defense of the wife is that the several sums raised by mortgage and sale of her land, and the rents, grain, etc., from her farm, were loaned by her to her husband, on which he agreed to pay her interest, and that the property was conveyed to her in good faith in settlement of the amount due her, which she claimed without interest, amounted to \$3,990.

The court found the transaction fraudulent, and set aside the conveyance to the wife, and vested the title to the land in plaintiff, and defendants appealed.

1. That Mrs. Vaughan inherited from her father 70 acres of land, and that the proceeds from mortgage and sale of the same, amounting to \$3,500 was received and used by her husband, does not admit of a doubt under the evidence. Of this amount \$2,500 was received in the state of Illinois and \$1,400 in the state of Kansas. The statutes of these states, which were offered in evidence, do not differ materially in respect to the rights and liabilities of married women. The supreme court of Illinois, speaking of the changes the statute of that state have effected upon the common-law rights of the wife,

uses this language: "No question as to subordination to the common-law rights of the husband can arise; for, backward as may be courts or the profession to recognize the situation, those rights are by the statute swept away and gone. She is entitled to own, hold, possess, and enjoy such estate, precisely as if she were sole and unmarried. As to such estate and her relations thereto she has no husband; ¹⁷⁶ he is as a stranger, even during the coverture": *Patten v. Patten*, 75 Ill. 447.

Applying the statute as thus construed in that state to the facts in this case, we think we can properly say that the reception and use by the husband of the proceeds of the wife's land implied a promise on his part to repay her, and as between them a valid indebtedness from the husband to the wife was created.

2. It is well settled in this state and elsewhere, that a debtor in failing circumstances may give one creditor a preference to the exclusion of others, and that a "debt due from a husband to the wife, stands on as good footing as a debt due to any other person, and she may be given a preference over other creditors": *Hart v. Leete*, 104 Mo. 338; *Sexton v. Anderson*, 95 Mo. 379; *Frank v. King*, 121 Ill. 250; *Hill v. Bowman*, 35 Mich. 191; *Winfield Nat. Bank v. Croco*, 46 Kan. 630.

It is equally well settled that the right of one creditor of an insolvent debtor to secure a preference over others is not affected by the fraudulent intent of the debtor, or by simple knowledge thereof on his part, if there was no actual participation therein: *Sexton v. Anderson*, 95 Mo. 379; *State v. Mason*, 112 Mo. 374; 34 Am. St. Rep. 390.

Upon the law and the undisputed facts the case stands thus: Defendant Josiah Vaughan became indebted to his wife and co-defendant Mary E. Vaughan, in 1881, in the sum of \$1,000, in 1884 in the sum of \$1,100 dollars, and in 1887 in the sum of \$1,400, and also some smaller sums; and in 1889, becoming insolvent, he caused the bulk of his property to be transferred to her in settlement of these debts, to the total exclusion of most other creditors. If this transfer was in good faith and without fraud on the part of the husband, or if with fraud, but without participation therein by the wife, then it must be upheld.

¹⁷⁷ 3. The evidence leaves no doubt in our minds that the purpose and intent of defendant, Josiah Vaughan, in causing this property to be conveyed to his wife was to hinder, delay, and defraud his creditors. In making written statements of

his financial standing, upon the strength of which he was enabled to obtain credit, not only was no mention made of a debt to his wife as one of his liabilities, but on being directly asked if he owed any confidential or other debts not mentioned, he answered, in writing, that he did not. When pressed by his creditors he traded his stock of merchandise, valued at about \$6,500, for which he took this real estate as part payment at a valuation of \$5,000, though a part of it he had never seen. It is evident a low estimate was placed upon the goods, and the land was valued above its real worth. No invoice of the goods was taken. The total indebtedness to the wife, with six per cent interest, was about \$500 less than the amount for which the land was taken. Of the \$1,500 cash received for the stock of goods about one-half was paid on a debt held by a brother of the purchaser, who assisted in making the sale, but no satisfactory account could be given of what was done with the remainder. The debts unprovided for were incurred in the purchase of the merchandise exchanged for this land. Nothing was paid on these debts. Every circumstance connected with this transaction is inconsistent with honesty of purpose and good faith on the part of the husband.

4. The unlimited right of ownership of the property, inherited by Mrs. Vaughan from her father, implied and included not only the unrestricted right of disposal to her husband, which right is unfettered under the laws of Illinois and Kansas, but also imposed upon her the corresponding duty and obligation of so using and dealing with it as not to mislead and deceive others ¹⁷⁸ to their injury. The confidence the wife imposed in the integrity of her husband, which induced her to give him unlimited control of her property and money, and permitted him to invest it in his own business for a series of years, and her reliance on his repeated assurances of repayment, should not be allowed to shield the property from the just claims of those who, in good faith, gave the husband credit in reliance upon his ownership. The transfer of the legal title and possession of the property to her, before the claims of the creditors were asserted, could not strengthen her right, nor does the fact that she made frequent demands of payment aid her. The laws of the states of Illinois and Kansas gave her the right to enforce her demands against her husband, and the only reason she could give for not doing so was that she did not wish him to think "she had no con-

fidence in him." Though, as she testified, making repeated demands of payment, she continued to supply him with money whenever it came into her hands. She took no note or other written evidence of indebtedness. She knew he was continually engaged in hazardous business enterprises, and was buying goods on credit, and that the sole capital invested was the money she allowed him to use.

As was said in a case in which the facts were very similar to those disclosed in this record: "Having constantly consented that he should hold himself out to the world as the owner of this property, and contract debts on the credit of it, up to the very hour of his disaster, it would be against the plainest principles of justice, and utterly subversive of every thing like fair dealing, to permit her to step in now, and withdraw from the process of the law, put in motion by his creditors, the very property she had permitted him, year after year, to represent to be his, and the apparent ownership of which had given him his business credit and standing": *179 Besson v. Eveland*, 26 N. J. Eq. 471. See, also, to the same effect, *Humes v. Scruggs*, 94 U. S. 23; *City Nat. Bank v. Hamilton*, 34 N. J. Eq. 162.

Under the circumstances disclosed in this case it must be held that Mrs. Vaughan, by her conduct, participated in the fraudulent conveyance of her husband, and the judgment is affirmed.

All concur, except Barclay, J., who is absent.

HUSBAND AND WIFE—RIGHT TO PREFER WIFE AS CREDITOR.—As to a just debt, the husband has the right to prefer his wife over other creditors, and land or other property conveyed to her for the purpose of paying such debt is free from the claim of any other creditor: *Cornell v. Gibson*, 114 Ind. 144; 5 Am. St. Rep. 605; *Drew v. Corliss*, 65 Vt. 650. See the notes to *Driggs' etc. Bank v. Norwood*, 7 Am. St. Rep. 83, and *Wilder v. Brooks*, 88 Am. Dec. 55.

HUSBAND AND WIFE—INDEBTEDNESS BETWEEN—FRAUDULENT CONVEYANCES.—When a husband pays his wife for services rendered by her, and in consideration of the loan by her to him of the sum so paid, and of other property given her by her relatives, makes to her a conveyance of property, such conveyance is valid as against a subsequent creditor: *Daygett v. Bulfer*, 82 Iowa, 101; 31 Am. St. Rep. 464, and note. If a wife places in her husband's hands money which is her separate property, the presumption is that he receives it as his own, in the absence of any evidence that he received it in trust for her: *Clark v. Patterson*, 158 Mass. 388; 35 Am. St. Rep. 498, and note, with the cases collected; *Kanawha Valley Bank v. Atkinson*, 32 W. Va. 203; 25 Am. St. Rep. 806, and note; *Cass County Bank v. Weber*, 83 Iowa, 63; 32 Am. St. Rep. 288, and note.

MITCHELL v. BRADSTREET COMPANY.

[116 MISSOURI, 226.]

LIBEL—BY MERCANTILE AGENCY.—A false and voluntary publication by a commercial agency that a business firm has assigned, sent to all the subscribers of such agency regardless of their location or interest in the financial standing of the firm, is not privileged, though published without malice; especially when such agency is requested to retract the statement and refuses to do so.

LIBEL—IMPLIED MALICE.—Every willful and unauthorized publication, imputing to a merchant or business man conduct which is injurious to his character and standing as a merchant or business man, is a libel, and implies malice.

LIBEL—WORDS CHARGING INSOLVENCY—ACTIONABLE PER SE.—A false publication by a mercantile agency that a business firm has assigned is actionable *per se*, and malice is implied therefrom.

LIBEL—CHARGING INSOLVENCY—DAMAGES.—In an action of libel against a mercantile agency for a false publication that a business firm has assigned, it is entitled to recover large damages upon proof of the falsity of the publication, and that it was doing a large and lucrative business, principally upon credit, and that the publication compelled it to retire therefrom, and almost entirely destroyed its credit.

INSTRUCTIONS.—FAILURE TO GIVE instructions not asked is not error.

PRACTICE.—EVIDENCE ADMITTED WHICH MERELY SUPPORTS the averments in the answer cannot be assigned as error by the defendant.

LIBEL—EVIDENCE.—In an action against a mercantile agency for a libelous publication, evidence is admissible by its subscribers who are also creditors of plaintiff to show the fact of publication, when the answer admits that if made, such publication was in the usual course of business.

LIBEL.—EVIDENCE OF LOSS OF CUSTOM as an element of damage after a libelous publication by a mercantile agency is admissible under an allegation in the petition that "the publication is a libel on plaintiffs' good name and credit, and that by reason thereof they were forced to suspend business to their damage" in a designated amount.

LIBEL—ADMISSION OF IMMATERIAL EVIDENCE.—In an action against a mercantile agency for a libelous publication as to the solvency of plaintiff, the introduction by the latter of evidence of his failure to collect accounts other than those set out in the petition for which special damages are claimed is not reversible error, as no substantial injury could have resulted to defendant therefrom.

LIBEL.—SPECIAL DAMAGES when claimed in an action for libel must be alleged and proved as in any other case.

LIBEL—DIRECTING VERDICT.—If, in an action for libel, the publication in dispute sent out by a mercantile agency is libelous *per se* as to all other persons to whom it is sent, except as to creditors of the plaintiff, the jury is properly instructed to find for the plaintiff. The only question for consideration is the amount of damages that plaintiff is entitled to recover.

*Boyle and Adams, and George R. Lockwood, for the appellant.
Harvey and Hill, for the respondents.*

²³⁰ BURGESS, J. Action for libel. On the twenty-fifth day of November, 1889, and prior thereto, the plaintiffs were partners, engaged in the mercantile business in the town of Sugar Loaf, Cleburne county, Arkansas, under the firm name and style of Mitchell, Smith & Co. The plaintiffs kept a general store; their ²³¹ stock consisting of such goods as are usually carried by country merchants. While thus engaged the defendant, duly organized and doing business in St. Louis, Missouri, and conducting a mercantile agency, under the name of the "Bradstreet Company," on the date aforesaid, published of and concerning the plaintiffs the following language and accusation, to wit: "Mitchell, Smith & Co., of Sugar Loaf, Arkansas, G. S., assigned."

The petition alleges that the publication was false, and claims special damages for injuries sustained to their credit in various ways and with different ones of their patrons and customers.

The material part of the answer of defendant is as follows: "And further answering said amended petition, defendant says: That it is a corporation organized for, and engaged in, the business of conducting a mercantile agency, and has been engaged in said business for many years, and is now, and was on November 22, 1889, and had been for many years prior to said date, employed by a large number of merchants and manufacturers throughout the United States as their representative and agent to collect, procure, and preserve for them, said patrons or employers, reports and information as to the estate, property, credit, conduct, character, and trustworthiness of persons and corporations engaged in trade or commerce in the United States and elsewhere, so that defendant's said employers, who are commonly known as subscribers to defendant's agency, may have the knowledge and information necessary to enable them to safely and properly conduct business with strangers or distant customers, and it is expressly agreed between defendant and its said employers that all information, whether written, printed, or verbal, furnished by defendant, its agents, or servants, shall be held in strict confidence, and used ²³² exclusively for the benefit of such subscriber; and for the sole purpose of giving its said employers or subscribers, in strict confidence, and for their exclusive use and benefit, as aforesaid, reports and information as to merchants and corporations engaged in mercantile pursuits in various parts of the country, defendant

issues from time to time, in the city of St. Louis and elsewhere, to its said employers, small sheets containing such reports and information concerning merchants and manufacturers in various portions of the country, as defendant believes to be true and of value or importance to its aforesaid subscribers; and if defendant published of and concerning plaintiffs the words complained of in plaintiff's petition, defendant had good reason to believe, and did believe at the time of alleged publication, that the same was true; and defendant further says that at the time of alleged publication plaintiffs were unknown to the agents and servants of defendants, and that said publication, if made, was made innocently, without malice, in the usual course of business, and to defendant's said subscribers or employers only, in strict confidence, and for the exclusive use of said subscribers, and in the belief that plaintiffs were customers of defendant's subscribers, or of some of them, and defendant says that said subscribers, or some of them, were creditors of plaintiffs or otherwise directly interested in the estate, property, credit, conduct, and character of plaintiffs."

The proof tends to show that plaintiffs were the only firm at the date aforesaid doing business in Sugar Loaf under the said name of "Mitchell, Smith & Co." That at the time of said publication they were doing a large credit business with farmers, and were dependent upon their good standing and credit among merchants at St. Louis and elsewhere as a means of conducting and carrying on their said business. That at ²²² the time of said publication, owing to the partial failure of the cotton crops in their section of the country, they were unable to collect, in full, debts due to them, and were dependent upon their credit and standing among their creditors as a means of successfully prosecuting their said business. They were somewhat indebted at the time of the publication to parties in the city of St. Louis, but their assets were ample to meet and pay all of their liabilities, had their credit and standing among their said creditors been unimpaired by the publication aforesaid. Up to the time of said publication the creditors of the respondents were resting satisfied, and the business of respondents was being pursued in a safe and comparatively prosperous manner.

The proof also shows that the publication complained of was through the medium of what is known as *Bradstreet's Sheet*, a daily paper published by defendant in the city of St.

Louis, and circulated among the merchants of said city and surrounding states.

It is also shown, that the defendant was notified, in a day or two after such publication, that the same was false, but it declined, or failed in the subsequent issue of its said sheet to retract or apologize, or make any explanation of said publication. The proof shows that plaintiffs, prior to said publication, had good credit in the city of St. Louis, that is credit to an extent commensurate with all their necessities; but on the coming out of said publication, their creditors became restless, some of them placing their claims in the hands of attorneys, some writing urgent letters, and one stopping goods in transit, while others in St. Louis became exceedingly apprehensive, and by their repeated inquiries at the office of Hill, Fontaine & Co., plaintiffs' principal creditor, compelled the latter to ²³⁴ take urgent steps upon their claim, resulting in plaintiffs' sale of their property at a sacrifice, the suspension of their business, and injury of their credit.

At the close of plaintiffs' evidence defendant asked the following instructions: "The court instructs the jury that, under the pleadings and evidence, plaintiffs are not entitled to recover in this action, and you will therefore find for defendant." The court refused to give this instruction, to which refusal defendant duly excepted.

At the close of the whole case defendant asked the following six instructions, to wit:

"1. The court instructs the jury, that there is no evidence in this case showing that defendant published of plaintiffs the words complained of with malice in fact, that is through hatred, ill-will, or a desire to injure plaintiffs as merchants or individuals.

"2. The court instructs the jury, that defendant had the right to report to such of its customers as were creditors of the plaintiffs any information touching plaintiffs' financial condition which it received in the usual course of business and believed to be true, and that defendant is not liable to plaintiffs for any damage that may have been caused them through such report so made.

"3. The court instructs the jury that, if they believe from the evidence that defendant, on or about November 23, 1889, published of plaintiffs the words complained of, and at that time plaintiffs were insolvent, that is, could not pay out of

their assets their debts as they matured in the ordinary course of business, then they will find for defendant.

"4. The court instructs the jury that, if they believe from the evidence that the damages claimed by plaintiffs were not caused by reason of the publication ²³⁵ by defendant of the words complained of, but were brought about by the circulation by others of reports injurious to the financial condition or responsibility of plaintiffs, or because plaintiffs were insolvent, that is, unable to pay out of their assets their obligations as they matured in the usual course of business, they will find for defendant.

"5. The court instructs the jury that if they believe from the evidence that plaintiffs, by compromising their debts, or some of them, saved more money than they lost through their suspension of business, they will find for defendant.

"6. The court instructs the jury that although they may find for plaintiffs, yet if they believe from the evidence that plaintiffs, by compromising their debts, or some of them, saved more money than they lost through their suspension of business, then they will find for plaintiffs nominal damages."

All of which instructions the court refused to give, to which refusal the defendant then and there at the time duly excepted.

The court then, of its own motion, gave the following instruction:

"The court instructs the jury as follows, viz: Under the evidence adduced your verdict must be for the plaintiffs; the only questions left for your decision therefore are those relating to the amount of damages to be assessed.

"Damages are three kinds, viz., nominal, compensatory, and punitive. Nominal damages are given when there has been no material injury shown by the evidence to have resulted to the plaintiff from the act of the defendant complained of and when punitive damages are not to be awarded. Compensatory damages are given when the evidence satisfies the jury that the plaintiffs have sustained material or substantial injury, ²³⁶ and that that injury was the result of the wrongful act of the defendant complained of. Compensatory damages should be a sum necessary and sufficient to compensate the plaintiffs for such injury.

"Punitive damages are awarded in a proper case in addition to nominal and compensatory damages, for the purpose of punishing the defendant for the wrongful act, and setting

an example before the community. Punitive damages are never allowed unless the evidence is sufficient to satisfy the jury that in the doing of the wrongful act complained of, the defendant was actuated by feelings of ill-will or hatred towards the plaintiffs, or reckless disregard of the consequence of the act.

“There is no evidence in this case that would justify you in the infliction of punitive damages. Your inquiry, therefore, is limited to the question as to whether or not the plaintiffs sustained material or substantial injury, and if that injury was caused by the publication in question, and if yea, then how much money will be necessary and sufficient to compensate the plaintiffs for that injury, and that should be your reward or damages.

“If you are not satisfied from the evidence that the plaintiffs have sustained material or substantial injury, and that that injury was caused by the publication in question, then you should assess nominal damages only.”

To the giving of said instructions the defendant then and there at the time duly excepted. Under the instruction of the court the jury found a verdict for plaintiffs for the sum of five thousand five hundred dollars, from which verdict and judgment thereon defendant prosecutes this appeal.

1. Defendants' first contention is, that the publication sheet was privileged, in the absence of motives, as to subscribers who were creditors of plaintiffs, and that the court erred in allowing the proof of publication to such ²²⁷ subscribers. If the proof showed that no other persons than the creditors of plaintiffs had received the publication sheet in which the libelous matter is shown to have been published, there are authorities which hold that in the absence of malice in the publication, owing to the confidential relations existing between such creditors and the defendant, the publication was privileged, and defendant was not liable in damages therefor, although the same was false.

In the case of *Trussell v. Scarlett*, 18 Fed. Rep. 214, it was held that “when a mercantile agency makes a communication to one of its subscribers who has an interest in knowing it, concerning the financial condition of another person, and when such communication is made in good faith, and under circumstances of reasonable caution as to its being confidential, it is a protected, privileged communication, and an action for libel cannot be founded upon it, even though the

information given thereby was not true in fact, and though the words themselves are libelous": See, also, *Locks v. Bradstreet Co.*, 22 Fed. Rep. 771.

But the answer in the case at bar admits, and the proof shows, that the publication sheet under consideration was not only sent to the creditors of plaintiff, but was sent to all of the subscribers of defendant, regardless of their location or interest in the financial standing of plaintiffs. While it may be conceded that the business of defendant is a laudable one, and, in so far it concerns the tradesmen, bankers, and manufacturers, and business of the country, almost indispensable, it cannot be that a company for hire, a moneyed consideration paid to them, can make a false statement or publication as to the financial standing of any person or persons or business firm, send it all over the country, to persons who are not the creditors of any such person or firm, as well as to those who are, and ruin them in their credit and ²²⁸ business, and then claim immunity from liability therefor upon the ground that such publication was privileged. We are not inclined to give our sanction to a doctrine which seems to us to be so harsh, and so unjust, and in this position we are sustained by courts of high authority.

In the case of *Pollasky v. Minchener*, 81 Mich. 280, 21 Am. St. Rep. 516, which was a suit against the agent of a commercial agency for libel, the supreme court of Michigan says: "The notification sheet containing the false statement respecting the acts of Pollasky Brothers was not alone sent to those who were dealing with them and extending them credit, but to between six and seven hundred subscribers in Michigan, and others residing out of the state, from some of whom they might wish to purchase goods upon credit, and this without any request being made to be informed of the standing or credit of the Pollasky Brothers, and others of whom, and by far the greater number, were engaged in different lines of business, and who were in no manner interested in knowing their standing, or financial ability or business integrity. To all such the communication was not privileged. It cannot be said that a blacksmith, a sawmiller and a lumber dealer, a furniture manufacturer, a dealer in hardware, a chemist, mineral water bottlers, butchers, book agents, physicians or druggists, or other business men mentioned in the notification sheets, who are not engaged in wholesale or retail dealing in dry goods, clothing, or boots or shoes, are at all interested

in the business standing of a dealer in dry goods, clothing, and boots and shoes. No court has gone so far as to hold all communications made by a mercantile agency to their subscribers, if made in good faith, but made generally without request, or to those inquiring concerning or interested in knowing the condition and financial standing ²³⁹ of a person, are privileged. On the contrary, courts have uniformly held that privilege does not extend to false publications made to patrons who have no such interest in the subject matter: *Goldstein v. Foss*, 2 Car. & P. 252; *Commonwealth v. Stacey*, 8 Phila. 617; *Taylor v. Church*, 8 N. Y. 452; *Ormsby v. Douglass*, 37 N. Y. 477; *Sunderlin v. Bradstreet*, 46 N. Y. 188; 7 Am. Rep. 322; *King v. Patterson*, 49 N. J. L. 417; 60 Am. Rep. 622; *Bradstreet Co. v. Gill*, 72 Tex. 115; 13 Am. St. Rep. 768; *Johnson v. Bradstreet Co.*, 77 Ga. 172; 4 Am. St. Rep. 77; *Erber v. Dun*, 12 Fed. Rep. 526."

"The law guards most carefully the credit of all merchants and traders. Any imputation on their solvency, any suggestion that they are in any pecuniary difficulties, is, therefore, actionable without proof of special damages . . . of merchants, tradesmen, and others in occupations where credit is essential to the successful prosecution, any language is actionable without proof of special damages, which imputes a want of credit or responsibility or insolvency": Newell on Defamation, Slander, and Libel, secs. 34 and 35, pages 192 and 193.

In the case in hand, the defendant was not even applied to by any of its patrons for information in regard to the financial standing of the plaintiffs, and the publication of the statement that plaintiffs had assigned was merely voluntary on their part, false in fact, and compelled them to retire from business. When asked to retract the statement they declined to do so. Under such circumstances the statement was in no wise privileged. The information acquired by defendant was its own, and was communicated to others or made public in such form and upon such terms as it dictated.

Neither the welfare or convenience of society will be promoted by a publication of matters, false in fact, ²⁴⁰ injuriously affecting the standing and credit of merchants and tradesmen broadcast through the land, within the protection of privileged communications. While the defendant's business is lawful, yet in its conduct and management it must be subjected to the ordinary rules of law, and its proprietors and

managers held to the liability which the law attaches to the like liability of others.

2. The next contention of defendant is that the publication was true that plaintiffs were in fact insolvent at the time thereof, and that the court for that reason should have given the instruction in the nature of a demurrer to the evidence. A firm is understood to be insolvent when unable to pay their debts as they fall due in the usual course of trade or business: Bouvier's Dictionary, Insolvency, 809. It "implies as well the present ability of the debtor to pay out of his estate all his debts, as also such attitude of his property as that it may be reached and subjected by process of law, without his consent, to the payment of such debts": *Eddy v. Baldwin*, 82 Mo. 369; *Thompson v. Thompson*, 4 Cush. 127; *Walton v. First Nat. Bank*, 13 Col. 265; 16 Am. St. Rep. 200.

We do not think that this contention is borne out by the evidence, as according to the statement of Mitchell, one of the plaintiffs, who testified in the case, and who knew all about the business of the firm and its assets, it had ample available means with which to have liquidated its indebtedness.

3. It is next contended that the publication was not libelous *per se*, and that therefore it was necessary for plaintiffs to allege in their petition and also prove special damages, before being entitled to recover. The authorities cited by defendant do not sustain this contention. If the libel complained of is not actionable ²⁴¹ *per se*, then defendant's position is correct, otherwise not.

In the case of *Weiss v. Whittemore*, 28 Mich. 366, the supreme court of that state say: "The definition of a libel, as given by Mr. Townshend upon a review of the authorities is, that it is a wrong done by writing or effigy; and if false and malicious, certainly, and for the purpose of injuring another in reputation, trade, employment, or property, every publication of language concerning a man or his affairs, which as a necessary or natural and proximate consequence occasions pecuniary loss to another, is *prima facie* a libel, if the publication be by writing."

A definition of libel, as quoted and approved by this court in *Nelson v. Musgrave*, 10 Mo. 648, is: "A malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of the dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule." This definition has been cited

with approval in *Price v. Whitely*, 50 Mo. 439; and *Legg v. Dunleavy*, 80 Mo. 563; 50 Am. Rep. 512. "Any printed publication that tends to bring a man into disrepute, ridicule, or contempt, is a libel in a legal sense."

In the case of *Hermann v. Bradstreet Co.*, 19 Mo. App. 227, it was held that the following words: "Joseph Hermann, brickmaker, is in the hands of the sheriff," which were published of and concerning Hermann, who was engaged in the business of brickmaking, were libelous and actionable *per se*. Words written or spoken of one's trade are actionable when they might not be so if spoken of the individual simply: Townshend on Slander and Libel, secs. 132-179.

Every willful and unauthorized publication, written or printed, which imputes to a merchant or ²⁴⁹ other business man conduct which is injurious to his character and standing as a merchant or business man, is a libel, and implies malice: *Locke v. Bradstreet Co.*, 22 Fed. Rep. 771.

So it was held in the case of *Newell v. How*, 81 Minn. 235, that in those trades or professions in which, ordinarily, credit is essential to their successful prosecution, as, for example, that of merchant, language is actionable *per se* which imputes to one in such trade or profession a want of credit or responsibility, or insolvency, past, present, or future. Such language necessarily, or naturally and presumptively, causes pecuniary loss to the person of whom it is published: See, also, *McGinnis v. Knapp*, 109 Mo. 137.

These authorities abundantly show that the publication here complained of, to wit: "Mitchell and Company assigned," was actionable *per se*, and that from the publication, the same being false, malice is implied; and that the court did not commit error in instructing the jury to find for plaintiffs.

4. It is also contended that the damages assessed by the jury are excessive, so much so that the jury must have been governed by passion or prejudice in arriving at their verdict. There does not seem to be any thing in the case to justify this position, when all the facts connected with the publication and the result thereof are taken into consideration. The plaintiffs seem to have been doing a large and lucrative business, principally upon credit, and the act of defendant compelled them to retire therefrom, and in fact almost entirely destroyed their credit. The verdict, in our opinion, was not

more than they were entitled to recover under the evidence and instruction of the court.

5. The final contention on the part of defendant is, that under article 2, section 14, constitution of Missouri, ²⁴³ which provides: "That no law shall be passed impairing the freedom of speech; that every person shall be free to say, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact"; that it was the duty of the court to have instructed the jury that they were the judges of the law as well as of the fact, and that because of the failure to do so, that the instruction given in the case was erroneous. No instruction of this character, or presenting this phase of the case to the jury, was asked by defendant.

Section 2188, Revised Statutes, 1889, provides that when the evidence is concluded, and before the case is argued or submitted to the jury, or to the court sitting as a jury, either party may move the court to give instructions on any point of law arising in the cause, which shall be given or refused. And that the court may of its own motion give like instructions, etc. Defendant cannot now be heard to complain of the refusal of the court to give an instruction which was not asked. It is not made the duty of the trial court by statute in civil, as it is in criminal, cases to instruct the jury whether it is asked to do so or not. Besides, no such question is made in the motion for new trial.

Being unable to discover any prejudicial error in the trial of the cause, either in the admission or exclusion of evidence, or the refusing or giving instructions, and the judgment being for the right party it is affirmed. All concur.

²⁴⁴ ON MOTION FOR REHEARING.

BURGESS, J. It is urged by defendant in its motion for rehearing that several questions of importance, and upon which the result of the case depends in this court, were overlooked.

The first is that this court did not pass upon the action of the trial court in overruling the objections of defendant to the testimony of Messrs. Martin, Wear and Hill, witnesses for plaintiffs, who were subscribers of defendant, and creditors of plaintiffs for the reason that the sheet as to them was privileged. Defendant admits that the publication was made

in the usual course of business, but to its subscribers and employers only. The testimony of these witnesses was admissible for the purpose of showing the publication of the sheet, as their statements with reference thereto were simply affirmative of the allegations in the answer. Their statements in regard to other matters privileged were not of sufficient importance to justify a reversal on that ground. Nor would the action of the court in allowing proof of the stoppage of goods by a merchant not shown to have been a subscriber of defendant, nor to have seen its sheets, justify a reversal of the case for that reason.

This court is expressly prohibited by section 2303, Revised Statutes, 1889, from reversing the judgment of a trial court, unless it should believe that error was committed by such court against the appellant or plaintiff in error, and materially affecting the merits of the action. There was no such error in the court's ruling on the admission of the evidence in reference to this matter.

Defendant's next contention is that we failed to decide whether evidence of loss of custom in 1890 was inadmissible as showing either general or special damages ²⁴⁵ inadmissible as general damages, as defendant claims, because too remote and not the necessary consequence of publication complained of and inadmissible as special damages, because it did not accrue before the commencement of the action, because not pleaded, and because not the natural and proximate consequence of the words published.

As to the remoteness of the damage, this precise question was passed upon by the court of appeals of New York on a trial of an action for libel, where the alleged libelous publication contained charges injurious to plaintiff's character and to his business, and the complaint averred that by reason of the libel plaintiff had been greatly injured in his business by the loss of goodwill and patronage. Plaintiff was permitted to testify as a witness, that immediately after the publication his business fell off, and to state the amount of his daily sales up to, and immediately after, such publication, and it was held not to be error: *Bergman v. Jones*, 94 N. Y. 51.

So when words actionable *per se* are spoken of an innkeeper in the way of his trade, evidence may be given of a general loss of custom and decline in his business: *Evans v. Harries*, 1 Hurl. & N. 251.

It was also held in the case of *Ashley v. Harrison*, 1 Esp.

48, that to prove the loss of profits sustained by plaintiff, from the absence of a lady who was engaged to sing at a musical entertainment, a witness who was the boxkeeper was called, and he was asked if, in consequence of her declination to sing, several persons had not given up their boxes? The question was objected to, and it was ruled that the witness might be asked generally, "whether the receipts of the house had not diminished from the time she declined to sing," it being stated in the declaration that in consequence of the libel and the lady's refusal to sing, the plaintiff has ²⁴⁶ lost the profits of several performances. And so it was held in the case of *Broad v. Duester*, 8 Biss. 265, that when a publication is libelous *per se*, special damage to the business may be shown, though the words were not published concerning that business; and it is not necessary to allege the names of the customers who had ceased to do business with the plaintiff in consequence of the publication.

So it was held in the case of *Weiss v. Whittemore*, 28 Mich. 366, that the general allegation of the loss of trade is sufficient in ordinary cases of libel without setting out the names of the customers driven away or lost; and it may be supported by evidence of such general loss.

In the case of *Evans v. Harries*, 1 Hurl. & N. 251, in an action of slander, it was held that words spoken of the plaintiff in his business with a general allegation of loss of business, it is competent for the plaintiff to prove, and the jury to assess damages for, a general loss or decrease of trade, although the declaration alleges the loss of particular customers as special damages, which is not proved.

So in the case of *Harrison v. Pearse*, 1 Fost. & F. 567, it is held that the jury might give the plaintiff in the case such damages as they thought had arisen from the decline of circulation, and subsequent to the action, and this as general damages. The general allegation in the petition in the case in hand is, that the "publication is a libel on plaintiff's good name and credit, and that by reason thereof they were forced to suspend their business to their damage in the sum of fifteen thousand dollars." The damages claimed and the proof to show loss of trade, was such damages as flowed directly from, and the necessary result of, the publication, and such proof was permissible as general damages under the allegations in the petition: 2 Greenleaf on Evidence, 15th ed., sec. 420.

²⁴⁷ The mere fact that the trial court permitted the plain-

tiff over defendant's objections to introduce proof of their failure to collect accounts other than those set forth in the petition, on account of which special damages are claimed, would not justify this court in reversing the case, as no substantial injury could have possibly resulted to the defendant therefrom. Special damages, when claimed in an action for libel, must be alleged and proved as in any other case where such damages are claimed.

Another reason insisted upon why a rehearing should be granted is because the decision of the court as to the instruction given by the trial court is in conflict with the decisions of this court in the cases of *Sullivan v. Hannibal etc. R. R. Co.*, 88 Mo. 169; *Iron Mountain Bank v. Murdock*, 62 Mo. 70; *Whalen v. St. Louis etc. Ry. Co.*, 60 Mo. 323; *Karle v. Kansas City etc. R. R. Co.*, 55 Mo. 476; and *McKeon v. Citizens' Ry. Co.*, 43 Mo. 405. The rule laid down in those cases is, that the instructions taken as a whole should present the entire case, and that an instruction is erroneous which singles out certain facts and directs a verdict, if they are found, regardless of other facts at issue.

The publication being libelous *per se* as to all other persons than creditors of plaintiffs, and its publication being admitted by defendant in its answer, and the proof showing that the sheet was sent to others than creditors, the court could not have done otherwise than to have instructed the jury, as it did, that they were bound to find for plaintiffs, the only question for their consideration being the amount of damages that plaintiffs were entitled to recover under the evidence and instruction. The instruction is not obnoxious to the objection urged against it. On the contrary, it presented the case fairly to the jury.

The motion is overruled.

All concur.

LIBEL BY MERCANTILE AGENCY.—False publications respecting the character and financial standing of a business man, furnished by a mercantile agency to its subscribers generally, without request, are libelous, and not privileged, though made in good faith: *Pollasky v. Minchener*, 81 Mich. 280; 21 Am. St. Rep. 516, and note; *Johnson v. Bradstreet Co.*, 77 Ga. 172; 4 Am. St. Rep. 77, and note; *Bradstreet Co. v. Gill*, 72 Tex. 115; 13 Am. St. Rep. 768, and note; note to *Muetus v. Tuteur*, 20 Am. St. Rep. 122, and the extended note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 348. See, also, *Woodruff v. Bradstreet Co.*, 116 N. Y. 217, and *Hessel v. Bradstreet Co.*, 141 Pa. St. 501.

LIBEL—CHARGING INSOLVENCY.—Written or printed words which impeach the credit of any merchant or trader by imputing to him insolvency, or even embarrassment, are libelous: *Hayes v. Press Co.*, 127 Pa. St. 642; 14 Am. St. Rep. 874, and note. Words, spoken or written, injurious to a person in his business are actionable *per se*: *Oliver v. Perkins*, 92 Mich. 304; *Heubl v. Schrub*, 94 Mich. 542; note to *Hirshfield v. Fort Worth Nat. Bank*, 29 Am. St. Rep. 668.

LIBEL—MALICE, WHEN IMPLIED.—Any publication injurious to the character of another, and not shown to be true, or to have been justifiably made, is actionable, malice being inferred in such a case: *Collins v. Dispatch Pub. Co.*, 152 Pa. St. 187; 34 Am. St. Rep. 636, and note; *Bradstreet Co. v. Gill*, 72 Tex. 115; 13 Am. St. Rep. 768; *Holt v. Parsons*, 23 Tex. 9; 76 Am. Dec. 49, and note; *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102, and note.

LIBEL.—SPECIAL DAMAGES MUST BE ALLEGED AND PROVED, where the words charged are not actionable *per se*: *Hirshfield v. Fort Worth Nat. Bank*, 83 Tex. 452; 29 Am. St. Rep. 660, and note; *Woodruff v. Bradstreet Co.*, 116 N. Y. 217.

LIBEL.—DAMAGES GENERALLY: See the extended notes to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 339, and *Terwilliger v. Wanda*, 72 Am. Dec. 426. The liability for libel is the usual liability in tort for the natural consequences of a manifestly injurious act: *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238.

APPEAL.—FAILURE TO INSTRUCT THE JURY ON A PARTICULAR POINT IS NOT ERROR, when no instruction upon that point has been requested: *Schuster v. Bauman Jewelry Co.*, 79 Tex. 179; 23 Am. St. Rep. 327.

CRAVENS v. ROSSITER.

[116 MISSOURI, 333.]

DEEDS—DELIVERY—JUDGMENT—PRIORITY.—A judgment rendered subsequently to the execution of a deed by the judgment debtor, but before its delivery, has a priority over such deed.

DEEDS—DELIVERY—ACCEPTANCE.—The payment of a debt by the execution and delivery of a deed requires the assent of the grantee, and until such assent is given no title is transferred.

DEEDS—DELIVERY of a deed to a recorder for registry is not a delivery to the grantee.

DEEDS — REGISTRY AS DELIVERY — RATIFICATION — INTERVENING LIEN.—Registry of a deed by the grantor, without the grantee's knowledge or consent, does not of itself constitute a delivery. The subsequent ratification and acceptance of the deed by the grantee do not relate back so as to cut out an intervening judgment lien.

J. R. Vaughan, for the appellant.

Goode and Cravens, for the respondents.

343 BLACK, P. J. This was ejectment for a lot in the city of Springfield. E. T. Robberson conveyed the property to Lemuel Rossiter by a deed dated the 21st of April, 1887. The

plaintiffs put in evidence a sheriff's deed to them dated the 10th of June, 1889, based upon a judgment rendered by the circuit court against Lemuel Rossiter on the 19th of December, 1888. The title of the defendant is a deed to him from Lemuel Rossiter dated the 13th and recorded the 15th of December, 1888. Though the deed from Lemuel to William Rossiter bears date and was recorded a few days prior to the date of the judgment, still the claim of the plaintiff is that the deed to William was not delivered until after the date of the judgment, and for this reason the judgment has the priority.

At the date of the deed Lemuel Rossiter resided in Clay county. On the 15th of December, 1888, he handed it to the recorder of Greene county, and requested the latter to record it at once. The recorder filed and recorded the deed, and, pursuant to directions, sent it to Lemuel Rossiter by mail on the eighteenth of that month. Lemuel received it at his home on the nineteenth, and on the same day forwarded it by mail to his brother William, the defendant, who resided at La Crosse, Wisconsin. William says he was away from home at that time and did not get the deed until his return, shortly before Christmas. The recorder did not know the defendant, and there is no pretense that he was the agent of the defendant for any purpose whatever.

It appears Lemuel Rossiter owed his brother two thousand dollars borrowed in October, 1887, for which he gave his note, due in one year. He and the defendant both testified that the deed was made and accepted in payment of ²⁴³ this debt, though it seems William retained the note. The proof shows beyond all doubt that the deed was executed, recorded, and forwarded to William without his knowledge. There had been no previous communication or correspondence between the brothers on the subject. Such are the undisputed facts.

The delivery of a deed is the final act, without which it cannot take effect as a transfer of the title. The delivery may be to the grantee himself or to a third person for him. "The delivery may be complete without the presence of the other party, or any knowledge of the fact by him at the time, if it be made to his previously constituted agent, or, if being made to a stranger the transaction is subsequently ratified": 2 Greenleaf's Evidence, sec. 297. There are many cases where an acceptance of the deed will be presumed, as where the deed is manifestly for the benefit of the grantor, as has been

held in a number of cases in this court, but the principle can have no application here for several reasons. In the first place the question of delivery here does not stand on a presumption arising from the fact that the deed was recorded. The question is to be determined from all the facts disclosed by the evidence. In the next place the evidence shows that the deed was made in satisfaction of the two thousand dollars debt. Unless made upon a valuable consideration it was fraudulent and void as to the creditors of the grantor. The payment of that debt by the execution and delivery of the deed required the assent of the grantee. It was for him to say whether he would accept the deed on such terms, and until he in some way gave his assent the deed could not and did not take effect as a transfer of title. Until then there was no delivery. Indeed, the delivery of a deed is the concurrent act of two parties.

244 The delivery of the deed to the recorder for the purpose of having it recorded did not amount to a delivery to the defendant, for the recorder was not the agent of defendant, and hence had no authority to accept it. Besides this, he did not undertake to accept it for or in behalf of the defendant. He received it, recorded it, and transmitted it to the grantor. The grantor did not part with his dominion over the deed until after it had been recorded. It was said in *Pearce v. Dansforth*, 13 Mo. 360, that "the delivery of a deed by the grantor, for the purpose of having it recorded, may, under proper concurring circumstances, be regarded as a delivery to the grantee." And it was again said in *Burke v. Adams*, 80 Mo. 504, 50 Am. Rep. 510, that "where the deed is duly executed, acknowledged, and put to record by the grantor it is persuasive evidence as against him, especially where the purchase money is receipted for, that he intended thereby to pass the title; and the act would constitute delivery so as to throw the burden on the grantor and his privies to show by clear countervailing evidence that it was not a delivery." These cases do not hold that delivery of a deed to the recorder constitutes a delivery to the grantee. They hold, and only hold, that it is some evidence of a delivery. Recording a deed by the grantor, without the grantee's knowledge or assent, does not of itself operate as a delivery of the deed: 1 Devlin on Deeds, sec. 290, and cases cited. There was, therefore, no delivery of this deed until the defendant received

notice of its existence, and that was long after the date of the judgment.

It is true that the defendant ratified all that had been done by his brother by accepting the deed, and between the parties to the deed it would take effect as of its date, but the subsequent acceptance cannot relate ³⁴⁵ back so as to cut out the intervening judgment lien: *Parmelee v. Simpson*, 5 Wall. 81.

The case last cited is in many respects like the one in hand. In that case Parmelee claimed under a mortgage from Bovey and another, acknowledged and recorded on the seventeenth of a given month. Simpson claimed under a deed from Bovey, acknowledged and recorded on the fifteenth of same month. The court, speaking through Justice Davis, said: "The placing the deed on record was Bovey's own act, and done without the assent of Simpson. Under this state of facts there was manifestly no delivery. The execution and registration of a deed, and delivery of it to the register for that purpose, does not vest the title in the grantee. If Simpson had agreed to accept the deed in liquidation of his debt, and constituted the register his agent to receive it, then the delivery of the deed to the register would have been in legal contemplation a delivery to him. But it is said that he could ratify the acts of Bovey and the register. This is true, but he did not do this until after the execution and registration of the mortgage; and this ratification cannot relate back so as to cut out the mortgage. Simpson acquired no title until after the rights of the mortgagee had accrued, and he holds it encumbered with the lien of the mortgage."

It follows from what has been said that on the conceded facts the purchasers at the sheriff's sale acquired the title. It is therefore useless to examine the instructions. The judgment, which was for the plaintiffs, is affirmed. All concur.

DEEDS—JUDGMENTS—PRIORITY.—The lien of a judgment is preferred to a prior unrecorded deed: *Reed v. Austin*, 9 Mo. 722; 45 Am. Dec. 336, and note. See *Windom v. Schuppel*, 39 Minn. 35; or a prior unrecorded mortgage: *Manufacturers' etc. Bank v. Bank*, 7 Watts & S. 335; 42 Am. Dec. 240, and note: *Trapnall v. Richardson*, 13 Ark. 543; 58 Am. Dec. 338; *Green v. Franklin*, 86 Ga. 360; *Blohme v. Lynch*, 26 S. C. 300.

DEEDS.—NECESSITY FOR ACCEPTANCE BY GRANTEE: See the extended note to *Byars v. Spencer*, 40 Am. Rep. 217, and *Crain v. Wright*, 114 N. Y. 307.

DEEDS—DELIVERY OF TO RECORDER—SUFFICIENCY.—The registration of a deed does not amount to a delivery thereof: *Wellborn v. Weaver*, 17 Ga. 287; 63 Am. Dec. 235, and note; *Gilbert v. North American etc. Ins. Co.*, 23

Wend. 43; 35 Am. Dec. 542, and note; *Bullitt v. Taylor*, 34 Miss. 708; 69 Am. Dec. 412, and note; *Weber v. Christen*, 121 Ill. 91; 2 Am. St. Rep. 68, and note. See, also, the notes to *Hockenhull v. Oliver*, 12 Am. St. Rep. 238, and *Stone v. French*, 1 Am. St. Rep. 243.

CUMMINGS v. POWELL.

[116 MISSOURI, 473.]

PUBLIC LANDS—PATENT TO—IMPEACHMENT OF.—The validity of a patent to land, though in due form, is subject at all times to the inquiry whether the officers of the government who issued it had lawful authority to do so.

PUBLIC LANDS—PATENT TO—UNAUTHORIZED ISSUE OF.—A patent to public land issued by government officers acting without authority is absolutely void.

PUBLIC LANDS—PATENT TO—IMPEACHMENT OF.—A government patent to lands may be shown to be void by extrinsic parol evidence establishing a want of authority for its issue.

PUBLIC LANDS—PATENTS—UNAUTHORIZED ISSUE OF—EVIDENCE.—The act of government officers in issuing a patent to public land which had never been within their control, or had been withdrawn from that control at the time they undertook to so act, is absolutely void.

D. T. Jewett, for the appellants.

Alexander Martin, for the respondent.

475 **MACFARLANE, J.** This is an action of ejectment to recover a part of lot thirty-eight in Peter Lindell's second addition to the city of St. Louis. The facts of the case are clearly stated in the opinion of the court on a former appeal, reported in 97 Mo. 524, to which reference is made.

On the last trial, no reliance was placed on the statutes of limitation by defendant, and the circuit court found that the location of New Madrid certificate number three hundred and forty-eight, issued to James Conway, under which plaintiffs claimed title, was made upon land lying within Grand Prairie common fields, and held that these fields were not, at the time, subject to sale, and that therefore the location was void, and plaintiffs failed to show title upon which they could recover. This ruling was in accord with the decision of this court on that appeal.

It was held, in substance, on the former appeal: 1. That the act of February 17, 1815, for the relief of inhabitants of New Madrid county who suffered from earthquakes, only authorized persons owning injured lands to locate a like quantity on public lands, the sale of which was authorized by law;

2. That under the act of 1812 the Grand Prairie common field lots were reserved from sale whether confirmed to the inhabitants of the town on account of cultivation, or reserved to the use of the public schools; 3. That the limitation on the reservation to the public schools to one-twentieth part of the whole lands ⁴⁷⁶ did not authorize the sale of the remaining lots until those for school purposes had been designated and set off; 4. That the validity of neither the confirmation to inhabitants nor the reservation for the support of the schools depended upon a previous general survey of the out boundary of the commons; 5. That the common field lots had an existence and location independent of any future survey, and the surveyor had no discretion as to what lots should be included within the out boundary; and 6. That by the act of June 15, 1864, the United States granted to the state of Missouri, for the use of the public schools, all lots and parcels of land in the Grand Prairie common fields, which had not been before disposed of, and when the act of June 30, 1864, granting to James Conway and his legal representatives the land upon which his New Madrid certificate had been located was passed, the title to the United States had already been vested in the state of Missouri under the former act.

These questions, we take it, were settled by the former decision and will not be reconsidered.

Plaintiff now argues that the decision is in irreconcilable conflict with two opinions of the supreme court of the United States in cases of *Ehrhardt v. Hogaboom*, 115 U. S. 67, and *French v. Fyan*, 93 U. S. 169. The point of conflict is said to lie in the fact that those cases hold that an intruder in possession of land cannot show by parol evidence, against a patent, or other evidence of title from the government to said land, that the officer or agent giving the evidence of title violated his duty, while, on the trial of this case, such evidence was allowed, under authority of the former decision of this court.

⁴⁷⁷ We do not think the two cases cited analogous to this one. The former of them held that an intruder into the possession of land would not be permitted to show by parol evidence, as against one claiming under a patent, that the property claimed was swamp land. The court, in that case, says: "A patent of the United States, regular on its face, cannot, in an action at law, be held inoperative as to any lands covered by it, upon parol testimony that they were swamp and over-

flowed, and therefore unfit for cultivation, and hence passed to the state under the grant of such land on her admission into the union." In the latter case it was held that parol evidence was not admissible to show that land, covered by a patent to Missouri, under the swamp land act, was not in fact swamp land. That the decision of the secretary of the interior, who was authorized to determine what lands were swamp and overflowed lands, could not be overcome in that manner.

Plaintiffs insist that from 1822 they held the equitable title under a regular certificate for a patent from the recorder of land titles, issued after a full compliance with all the requirements of the act of 1815, and also held the legal title under the act of June 30, 1864; and that the official acts of the surveyor and recorder in locating this land and granting the certificate for a patent can no more be impeached by parol evidence, by defendant, than could the decision of the secretary of the interior in designating swamp land.

It is well settled under the decisions of this state and of the United States that even in actions at law the validity of a patent, though in due form, is subject at all times to the inquiry whether the officers of the government who issued it "had the lawful authority to make a conveyance of the title. But if those officers acted without authority, if the land which they purported to convey had never been within their control, ⁴⁷⁸ or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in them to act on the subject matter of the patent, not merely voidable. . . . It is, nevertheless, a clear distinction, established by law, and it has been often asserted in this court, that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue." These extracts from the opinion of Justice Miller in *Doolan v. Carr*, 125 U. S. 625, and the cases cited, are sufficient to show the recognized rule.

It is insisted that the principles announced in the foregoing opinion only apply to cases where there was a conflict between parties each claiming under a title from the government. It cannot be denied that the title to this land passed from the United States under one or the other of the acts of June, 1864. If the location of the New Madrid certificate was valid, and passed to Conway the equitable title, then there can be no

doubt that the act of June 30, 1864, by operation of the doctrine of relation, carried to plaintiffs, who are the legal representatives of Conway, the absolute title to the land. If, on the other hand, the location of the certificate was void, as was held in the former appeal, for the reason that the act of 1812 withdrew the land from the control of the officers of the government who undertook to allow the location and grant a certificate for a patent, then it is equally clear that by the act of June 15, 1864, the title passed out of the United States, and vested in the state of Missouri for the use of the schools. So we have here two conflicting claims from the government, and, under the decisions cited, such evidence as by its nature is capable of showing a want ⁴⁷⁹ of authority for the location of the certificate was admissible.

By the act of 1812 the government withdrew from sale these common fields, and in 1822, under the act of 1815, the officers of the government granted to Conway, or his legal representatives, a certificate for a patent to a specific tract of land. The land affected by the act of 1812 was described generally as "common field lots and commons adjoining and belonging to the town or village of St. Louis." These common fields had an existence in point of fact at the date of the act. "A survey would have aided in identifying them, but they had been previously defined and located on the face of the earth." (Opinion on former appeal.)

The act of 1812 then had the effect of withdrawing from sale certain defined and specific land. The parol evidence was not offered for the purpose of proving a reservation or conveyance by the United States. These were shown by the acts of Congress. If the Conway location had been, in express terms, a part of the Grand Prairie common fields, it would have been void upon its face. The parol evidence was offered simply to identify the land which had been reserved, and to show that it included within its boundaries the land to which Conway was afterwards granted a certificate for a patent. Defendant, though an intruder, had the right to defend his possession by showing that plaintiff had no title, was himself attempting the intrusion, and that the valid, legal title and right of possession was in a stranger.

It is contended that the act of June 15, 1864, excepted the Conway location from the grant to the state for the use of the schools, by the use of these words: "Which have not heretofore been disposed of by the United States," in the body of

the act and by its proviso. The argument is that this location had, in ⁴⁸⁰ fact, been made, and whether rightfully or wrongfully done, the government here recognized and validated it. We will answer this contention in the language of Thomas, J., in an opinion delivered in this case in a division of the court: 20 S. W. Rep. 488.

"In the first place, we do not think Congress, by these acts, intended to create any new rights, but simply to grant the title of the United States to those who might be entitled to the lands, leaving conflicting claims to be determined by the courts; and in the second place, we hold that the exception from the operation of the grant contained in the act of June 15, 1864, applied only to the valid disposition of land, and to adverse rights and titles which had arisen under the law. Speaking of a reservation from a grant of this character, the supreme court of the United States in *Morton v. Nebraska*, 21 Wall. (*loc. cit.*) 673, said: 'When a vested right is spoken of in a statute it means a right lawfully vested, and this excludes the locations in question, for they were made on lands reserved from sale or entry. If Congress had intended to ratify invalid entries like these they would have used the language of ratification. Instead of doing this the language employed negatives any idea that Congress intended to give validity to any unauthorized location on the public lands.' In 1812 Congress had reserved the unclaimed lots in the St. Louis common fields for the support of schools, and at no time afterwards did it indicate in any way a disposition to depart from the purpose of the reservation, or to repudiate the trust thus voluntarily created, but, on the contrary, we may fairly assume that the acts of January 27, 1831, and June 15, 1864, were intended to effectuate that purpose and execute that trust. The land controversy being an unclaimed lot lying in the common fields of St. Louis, as they existed in 1803 and 1812, the act of June 15, ⁴⁸¹ 1864, conveyed the legal title thereto to the state of Missouri for the support of schools, and hence the government had no title upon which the subsequent act of June 30, 1864, could operate."

The case was tried and determined according to correct principles, and the judgment is affirmed. All concur, except Barclay J., not sitting.

PUBLIC LANDS—IMPEACHMENT OF PATENT.—A patent to public lands may be impeached for fraud or illegality: *Doe v. Watts*, 7 Smcdee & M. 363; 45 Am. Dec. 308; *Carter v. Spencer*, 4 How. (Miss.) 42; 34 Am. Dec. 106, and

note. This question will be found further discussed in the notes to the following cases: *Stephenson v. Goff*, 43 Am. Dec. 175; *Rogers v. Brent*, 50 Am. Dec. 434; *Terry v. Megerle*, 85 Am. Dec. 93, and the extended note to *Stark v. Mather*, 12 Am. Dec. 565.

PUBLIC LANDS—EFFECT OF PATENTS ISSUED WITHOUT AUTHORITY.—A patent is void which was issued from the government to land which had been previously appropriated by the government and reserved from entry: *Doe v. Watts*, 7 Smedes & M. 363; 45 Am. Dec. 308; *Perry v. O'Hanlon*, 11 Mo. 585; 49 Am. Dec. 100, and note. When a patent bears on its face evidence of a want of authority to issue it, it will be declared void when introduced in evidence in a suit in ejectment: *Alexander v. Greenup*, 1 Munf. 134; 4 Am. Dec. 541. A patent to lands may be shown to be void by showing that the land department had no jurisdiction to dispose of the land described in the patent: *Edwards v. Rolley*, 96 Cal. 408; 31 Am. St. Rep. 234, and note.

JOHNSON-BRINKMAN COMMISSION COMPANY v. CENTRAL BANK OF KANSAS CITY.

[116 MISSOURI, 558.]

PRACTICE.—SUIT CANNOT BE BROUGHT ON ONE CAUSE OF ACTION and recovery had on another.

TROVER AND CONVERSION CANNOT BE MAINTAINED when the plaintiff has neither the right of property in, nor the right of possession to, the chattels alleged to have been converted.

PRACTICE—PLEADING—ESTOPPEL.—A petition alleging that defendant, in disregard of plaintiff's rights, took certain wheat and converted it to his own use, and has the proceeds thereof in his possession and under his control equal to the value of such wheat, and that plaintiff has demanded the value of the wheat, is sufficient to support a verdict for money had and received, especially if the case is tried by both parties on that theory.

PRACTICE—VARIANCE.—Even if plaintiff by his instructions places his right of recovery upon a different ground from that stated in the petition, yet the defendant cannot complain if he commits like error by submitting the converse of the theory hypothecated in plaintiff's instructions.

PRACTICE.—PARTIES CANNOT COMPLAIN OF ERROR which they invite or adopt.

PAYMENT.—A CHECK on a bank is not payment unless by express contract it is so received.

SALES FOR CASH—PAYMENT—WAIVER.—A sale for cash can be avoided by the vendor upon failure by the vendee to pay the purchase money while the property is in his hands or in the hands of any other purchaser, unless the payment of the purchase price has been waived.

SALES FOR CASH—DELIVERY OF BILL OF LADING—WAIVER OF PREPAYMENT.—On a sale of goods for cash without express reservation of title, the voluntary delivery and transfer by the vendor to the purchaser of a bill of lading for the goods is *prima facie* a waiver of prepayment, especially as to third persons.

SALES FOR CASH—PAYMENT—WAIVER OF AS AGAINST THIRD PARTY.—The giving of a worthless check by a purchaser of goods for cash is not pay-

ment, and does not pass the title, but a delivery of a bill of lading in such case by the vendor to the purchaser is such laches on the part of the former as estops him from claiming the property or its proceeds in the hands of a third person who is an innocent purchaser. If, however, such third person has notice of the terms of the sale and of the nonpayment of the purchase money, the original vendor is not thus estopped.

ESTOPPEL—ELECTION OF REMEDIES.—On a sale of goods for cash, and a failure of payment, the vendor, by bringing an action by attachment against the purchaser to recover the purchase price, is not estopped from dismissing that action before judgment, and then maintaining an action for the conversion of the goods.

Hayward and Griffin, for the appellants.

Lathrop, Morrow, and Fox, for the respondent.

563 **BURGESS, J.** This is an action to recover the proceeds or value of six carloads of wheat. Prior to August 30, 1890, the Imboden Commission Company, a corporation engaged in the grain business, contracted to buy of the plaintiff in this action, also a corporation engaged in the grain business, six carloads of wheat. On that day, Saturday, August 30, 1890, the plaintiff delivered to the Imboden Commission Company the six cars of wheat in controversy, by delivering to them the original bill of lading, the inspector's certificate, elevator receipts, etc., and receiving in return the check of the Imboden Commission Company on defendant bank for three thousand, seven hundred and nineteen dollars and thirty-seven cents, being the price agreed upon. The Imboden Commission Company went to the Missouri Pacific Railway Company, and surrendered the Johnson-Brinkman bill of lading, receiving in exchange therefor a bill in their own names, consigning the grain to their order in St. Louis, and marked: "Notify C. H. Albers & Co.," to whom they had sold it. They drew a draft on Albers & Co. for three thousand, seven hundred and forty-three dollars and nineteen cents, which amount represented the price of the grain agreed on with Johnson-Brinkman Commission Company, and certain 564 commissions and charges for exchange. This draft was attached to the Imboden bill of lading, and, together with the usual receipts and certificates, was deposited with the defendant bank, being at once carried to the credit of the Imboden Commission Company. The purpose of the deposit was for the bank to forward the draft, etc., to St. Louis, and collect the proceeds of Albers & Co.

On the same day, August 30th, the bank sent the draft and bill of lading to its correspondent in St. Louis, to whom, on

Monday, September 1st, during banking hours, the amount thereof was paid by Albers & Co. The plaintiff deposited the check which Imboden Commission Company had given it for the wheat to their account at the Midland National Bank on the afternoon of Saturday, and on Monday, September 1st, it passed through the clearing house and was presented to defendant bank for payment, and payment was refused. On the afternoon of Monday, September 1st, apparently after banking hours, Imboden, president of the Imboden Commission Company, which had drawn the check, and Mr. A. D. Johnson, president of the plaintiff corporation, called on Mr. Thayer, cashier of the Central Bank, and demanded the wheat back, or the money for the wheat. Thayer claiming on the part of the bank that he had no funds applicable to such payment refused the request, saying, however, that if it should turn out Imboden had any thing he would turn it over.

Afterwards, and on the same day, Imboden turned over to Johnson all the property, apparently, that the Imboden Commission Company owned, consisting of some office furniture, etc., and Mr. Johnson, for the plaintiff, put up a notice on the door of the office of the Imboden Commission Company that plaintiff was in possession. Whether a bill of sale was executed or ⁵⁶⁵ not is not agreed by Johnson and Imboden, but there is no question that Imboden intended to pass the title of said property, and that Johnson, for the plaintiff, intended to receive it. It is, however, said both by Imboden and Johnson that this property was not intended as a payment on account of the purchase price of the wheat, but only as a slight contribution on the part of Imboden towards the expenses of the litigation that both supposed to be impending.

On the same day, September 1st, Johnson-Brinkman Company sued out a writ of attachment against the Imboden Commission Company, and on the writ garnished the Missouri Pacific Railway Company, but the wheat in controversy had been shipped from Kansas City, and was not seized under the writ of attachment. The attachment suit was pending in the circuit court until September 24th, when it was dismissed, and the present action instituted.

The terms of the sale from Johnson-Brinkman Company to the Imboden Commission Company were cash on delivery, and it was contended on this part of the case by the plaintiff that a check which was subsequently dishonored was in no sense payment; and that the terms of the sale not having

been carried out, the property in the wheat, or at least the right to possession of the wheat, had never passed either to the Imboden Commission Company or any one else. The bank, on the other hand, claimed that in dealing with the wheat they had acted merely as agents of the Imboden Commission Company, exercising no act of dominion over the wheat; that they had forwarded the bill and draft to St. Louis in the ordinary course of business, as expressly instructed by the Imboden Commission Company to do, and had demanded and received payment of the draft from the consignee designated, crediting the Imboden Commission Company ⁵⁶⁶ with the proceeds of said payment; and that when, on the afternoon of September 1, 1890, the check to Johnson-Brinkman was presented for payment, the state of the Imboden Commission Company's account justified them in refusing to pay it. On Saturday, August 30th, the account of the Imboden Commission Company was overdrawn \$8,041.80. Certain checks were paid on that day; and on the 1st of September, when the Johnson-Brinkman Commission Company presented their check the overdraft amounted to \$8,250.20, after crediting the amount of the Albers draft, and debiting the aggregate amount of checks paid that day, amounting to \$3,689.05. When the check to the Johnson-Brinkman Commission Company was presented, therefore, there were no funds to meet it.

As objection is taken by defendant to the petition—leaving out the formal part—it is copied in full, and is as follows:

“Plaintiff, for cause of action against defendant, states that plaintiff and defendant are and were at all the times hereinafter mentioned corporations duly created and existing under and by virtue and authority of the laws of the state of Missouri; that on the thirtieth day of August, 1890, plaintiff was the owner, and was entitled to the possession, of 4,017 20-60 bushels of number 2 hard wheat, contained in cars as follows, to wit: Car number 5021, Missouri Pacific, 629 bushels; car number 7308, Missouri Pacific, 623 20-60 bushels; car number 8225, Missouri Pacific, 588 20-60 bushels; car number 9222, I. M., 700 bushels; car number 119, H. C. A. & G., 800 bushels; and car number 12475, Missouri Pacific, 666 40-60 bushels; of a total value of three thousand seven hundred and nineteen and thirty-seven one hundredths dollars (\$3,719.37); that defendant on said thirtieth day of August, 1890, willfully and wrongfully, in utter disregard of

plaintiff's rights, took all of ⁵⁶⁷ said wheat, and converted the same to its own use, and has disposed of the same, and now has the proceeds thereof in its possession and under its control; that said defendant converted said grain to its own use, with full notice and knowledge of plaintiff's ownership and right to the possession thereof; that plaintiff demanded from defendant the return of said wheat, and since the disposal of said wheat by defendant, plaintiff has demanded from defendant the value of said wheat; that the proceeds of said wheat now in the possession and under the control of defendant as aforesaid is equal to the value of said wheat hereinbefore set out and mentioned, and that plaintiff is damaged in said amount by said conversion.

"Wherefore, plaintiff asks judgment against defendant for said sum of \$3,719.37, and interest thereon at six per cent per annum, and for all costs in this matter incurred and expended."

The answer of the defendant is a general denial. There was a verdict and judgment for plaintiff. A motion for a new trial, and also in arrest, were filed by defendant, which, being overruled, the case is here by appeal.

The law is well settled that an action cannot be brought on one cause of action and a recovery had on another: *Clements v. Yeates*, 69 Mo. 623; *Sandeen v. Kansas City etc. R. R. Co.*, 79 Mo. 278; *Finlay v. Bryson*, 84 Mo. 664; *Jones v. Loomis*, 19 Mo. App. 234. Nor can trover and conversion be maintained where the plaintiff has neither the right of property in, nor the right of possession to, the chattels alleged to have been converted: *Parker v. Rodes*, 79 Mo. 88; *Myers v. Hale*, 17 Mo. App. 204. But where money is received by one to which another is legally entitled; the latter may recover it in an action for money had and received. Under the Missouri code we have but one form of action for the enforcement or ⁵⁶⁸ protection of private rights, and redress or prevention of private wrongs, which is denominated a civil action: Revised Statutes, 1889, sec. 1989. If, then, the petition in this case states a good cause of action for money had and received, and the facts upon which it is predicated warrant it, the objection that it should have been a proceeding in equity is untenable, although it may contain other allegations that are redundant and immaterial, and which might have been stricken out on motion.

The petition avers that defendant, "in disregard of plain-

tiff's rights, took all of said wheat, and converted the same to its own use, and now has the proceeds thereof in its possession and under its control, and plaintiff has demanded from the defendant the value of said wheat; that the proceeds of said wheat now in the possession and under the control of defendant are equal to the value of," etc. If the wheat belonged to plaintiff at the time it was received by Albers and Company in St. Louis, and the latter afterwards sent this draft to defendant in payment therefor, and if at the time of the receipt thereof defendant knew that the wheat was the property of plaintiff at the time of the sale to Albers and Company, or that the sale of the wheat by plaintiffs to the Imboden Commission Company was a cash sale, and that the wheat had not been paid for by Imboden Commission Company, then the proceeds of the wheat was the property of plaintiff, and it may maintain its action against defendant as for money had and received to its use and benefit: *Missouri Pac. Ry. Co. v. McLiney*, 32 Mo. App. 166; *Cary v. Curtis*, 3 How. 236; *Kreutz v. Livingston*, 15 Cal. 344; *Tutt v. Ide*, 3 Blatchf. 249; *Bullard v. Hascall*, 25 Mich. 132; 4 Wait's Actions and Defenses, 469, and authorities cited.

Nor is it essential that any privity of contract should be shown; if plaintiff's right to the money is ⁵⁰⁹ established, and the defendant is shown to have received it under circumstances that he ought not to retain it, the law implies a promise to pay it to the party who ought to have it: *Calias v. Whidden*, 64 Me. 249; *Mason v. Waite*, 17 Mass. 563; *Eagle Bank v. Smith*, 5 Conn. 71; 13 Am. Dec. 37; *Colgrove v. Fillmore*, 1 Aiken, 347.

And so it has been held that where money has been received from the wrongful sale of personal property of another, the latter may waive the wrong and recover the amount received: *Tamm v. Kellogg*, 49 Mo. 118, and authorities cited. Such seems to be the theory upon which the case was tried by both parties, as is manifest from the instructions given in the case, especially as the seventh and eighth given on behalf of the defendant present this question squarely to the jury. Even if the plaintiff by its instructions placed its right of recovery upon a different ground from that stated in the petition, still the defendant will not be heard to complain where it committed a like error by submitting the converse of the theory hypothesized in plaintiff's instructions: *Iron Mountain Bank v. Armstrong*, 92 Mo. 265; *Hilz v. Missouri*

Pac. Ry. Co., 101 Mo. 36; *Thorpe v. Missouri Pac. Ry. Co.*, 89 Mo. 650; 58 Am. Rep. 120; *Bettes v. Magoon*, 85 Mo. 580; *Loomis v. Wabash etc. Ry. Co.*, 17 Mo. App. 340. A party cannot be heard to complain of an error which he invites or adopts. We think the petition sufficient to support the verdict for money had and received, and especially as the case was tried by both parties on that theory.

There was much irrelevant testimony introduced by plaintiff over the objection of defendant, but none of it is of such materiality as to justify a reversal on that ground, as it could not possibly have had any influence on the jury in making their verdict.

The terms of the sale of the six carloads of wheat by Johnson-Brinkman Commission Company to Imboden Commission Company being cash, and for which ⁵⁷⁶ the latter gave a worthless check, was the sale incomplete, or did the title of the wheat pass by the delivery of the bill of lading by the vendor to the purchaser and those claiming title under him with notice at the time of his purchase of the terms of the contract, or that the purchase money had not been paid? In the case of *National Bank v. Chicago etc. R. R. Co.*, 44 Minn. 224, 20 Am. St. Rep. 566, it was held that where goods are sold for cash on delivery, and payment is made by the purchaser by check on his banker, such payment is only conditional, and the delivery of the goods also only conditional; and if the check on due presentation is dishonored, the vendor may retake the goods even from an innocent subvendee for value, unless he has been guilty of such negligence or laches as equitably stop him from so doing. That a check on a bank is not payment unless by express contract it is so received, and is only payment when the money is received on it; and that there is no presumption that a creditor takes a check in absolute payment arising from the mere fact that he accepts it from the debtor, is well settled law, there is no question: 2 *Parsons on Contracts*, 7th ed., 624; *Woodburn v. Woodburn*, 115 Ill. 427; *Brown v. Leckie*, 43 Ill. 497; *Hodgson v. Barrett*, 83 Ohio St. 63; 31 Am. Rep. 527; *Benjamin on Sales*, sec. 731.

As between vendor and purchaser, where the sale of the chattels is a cash sale, the delivery of the thing sold and the payment of the purchase money are concurrent acts, and the former may reclaim his property if the purchase money be not paid according to the terms of the sale, either in the hands of the vendee or of a purchaser with or without notice

of the terms of the sale, and that the purchase money has not been paid, provided the vendor has not waived the cash payment, and has been guilty of no laches or such conduct ⁵⁷¹ as would estop him from so doing: *Decan v. Shipper*, 35 Pa. St. 239; 78 Am. Dec. 334; *Leven v. Smith*, 1 Denio, 571.

A cash sale and a sale upon subsequent condition are entirely different. In the first, the payment of the purchase money and delivery of the property are concurrent acts, one and the same transaction, while the latter is a sale and delivery of the thing sold on condition subsequent, subject to be defeated by failure of the purchaser to comply with the terms of the contract of purchase. The former may be avoided by the vendor upon failure by the vendee to pay the purchase money, while the property is in his hands or in the hands of any other purchaser unless the payment of the purchase price has been waived. While section 5178 of the Revised Statutes of 1889 invalidates conditional sales, as to the creditors of the vendor and subsequent purchasers in good faith when the goods are delivered to the vendee, except where the condition is evidenced by writing executed, acknowledged, and recorded as in the case of chattel mortgages, section 5180, same statute, was manifestly intended to invalidate numerous devices which had sprung up for the evasion of the statute, such as the practice of leasing, renting, or hiring the property when the real transaction was a sale on the plan of the vendee receiving possession and paying the purchase money in installments.

This statute has no application to the case in hand, where the terms of the sale are cash on delivery. In such case there is nothing to record, so as to notify subsequent creditors and purchasers, as there may be in conditional sales.

It was held by this court prior to the passage of sections 5178 and 5180 of the Revised Statutes of 1889, that in a sale of chattels when possession was delivered to the vendee, if by express agreement the title is to remain in the seller until the price is paid, the right of ⁵⁷² property is not settled in the purchaser until the payment: *Parmlee v. Catherwood*, 36 Mo. 479; *Robbins v. Phillips*, 68 Mo. 100, and authorities cited; *Little v. Page*, 44 Mo. 412. And if the vendor had been guilty of no laches, he might reclaim the goods even from an innocent purchaser: *Griffin v. Pugh*, 44 Mo. 326; *Little v. Page*, 44 Mo. 412. This statute, however, changed this, and since then a different rule has prevailed.

Where it is clear that payment is a condition precedent or at least concurrent, it necessarily follows that the right of property does not pass until that is done, even though the article is delivered, unless the circumstances show that the vendor thereby waived his right to immediate payment. The sale here being simply for "cash," no express reservation of title being made, the voluntary delivery and transfer of the bill of lading might well be considered, at least *prima facie*, a waiver of prepayment, especially as to third parties: *Smith v. Dennie*, 6 Pick. 262; 17 Am. Dec. 368; *Carleton v. Sumner*, 4 Pick. 516; *Farlow v. Ellis*, 15 Gray, 229; *Scudder v. Bradbury*, 106 Mass. 422; *Hammett v. Linneman*, 48 N. Y. 399; *Bowen v. Burk*, 13 Pa. St. 146; *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446; *Mixer v. Cook*, 31 Me. 340; *Freeman v. Nichols*, 116 Mass. 309; *Haskins v. Warren*, 115 Mass. 514; *Goodwin v. Boston etc. R. R. Co.*, 111 Mass. 487.

In the case in hand, a bill of lading for the wheat had been issued to plaintiff by the railroad company into whose cars the wheat had already been loaded for shipment, which bill of lading was transferred by plaintiff to the Imboden Commission Company and by the last named surrendered to the railroad company and another bill of lading issued by the railroad company to Imboden Commission Company. By section 744 of the Revised Statutes of 1889, bills of lading of the kind now under consideration are made negotiable. And by section 745 of the same statute, it is provided that any and all ⁵⁷² persons to whom the same may be transferred are deemed and held to be the owners of such goods, wares, merchandise, grain, flour, or other produce or commodity therein described. There was not only a delivery of the wheat in fact, but a symbolical delivery as well, which is declared by statute to vest in the assignee of the bill of lading the title to the property therein described.

The evidence shows very conclusively that there was no intention on the part of plaintiff to waive the cash payment for the wheat, but it was guilty of laches in suffering it to be shipped from Kansas City, and in delivering its bill of lading to the Imboden Commission Company, and it would in consequence thereof be estopped from claiming the wheat or the proceeds arising from the sale thereof in the hands of an innocent holder without notice. The sale of the wheat being a cash sale, if the defendant knew that the purchase money therefor had not been paid by Imboden Commission Com-

pany, or that Imboden Commission Company was not the owner of the wheat at the time it, defendant, received the draft in payment therefor from Albers & Co., through their correspondent in St. Louis, and applied it to the credit of Imboden Commission Company, it is not an innocent purchaser and must account to plaintiff for the amount of the purchase money, according to the contract price, between plaintiff and the Imboden Commission Company. These questions were fairly presented to the jury by the instructions of the court, and their finding was against the theory of innocence on the part of the defendant.

It makes no difference that Imboden Commission Company was indebted to defendant at the time of the transaction and prior thereto; it could not apply the funds that in legal contemplation belonged to another party to the payment of its debts, without its knowledge ⁵⁷⁴ or consent. The evidence shows very conclusively that defendant knew all about the business transactions of Imboden Commission Company, as all payments for grain purchased by it, as well also as all collections received on sales of grain sold by it, were made through defendant bank. The conclusion is irresistible that it knew all about the manner and mode of the purchase of grain by the Imboden Commission Company, and that the wheat in controversy, when bought by it, was bought for cash, and that it had not been paid for.

We do not think that the bringing of the attachment suit by plaintiff against the Imboden Commission Company, nor the purchase by plaintiff of the office fixtures amounted in law to an affirmance of the sale of the wheat by plaintiff to that company. This precise question was before the St. Louis court of appeals in the case of *Anchor Milling Co. v. Walsh*, 20 Mo. App. 107, where the facts were that the plaintiff had brought suit and levied an attachment upon certain property of the defendant, thereby asserting the defendant's title to it. Afterwards the plaintiff, finding that it had misconceived its remedy, it dismissed the attachment suit and brought replevin, thereby asserting the property belonged to it. The court held that there was no "estoppel by record, for the attachment has not proceeded to judgment. There is no estoppel *in pais*, for the defendant has not taken such action in consequence of the suing out of the attachment that he will receive detriment in a legal sense from the conduct of the plaintiff in changing his position and pursuing a different

remedy. If the rule of the circuit court were generalized it would amount to this, that a litigant elects his remedy in every case, in the first instance, at his peril. If he finds that he has made a mistake, whether in consequence of erroneous views of law or fact, he had, nevertheless, estopped himself from ⁵⁷⁵ retracing his steps. He cannot dismiss his suit and institute a new proceeding of a different nature against the same party. But no one supposes that this is law.

"It seems, however, to be supposed that there is something peculiar in an attachment suit which proceeds upon an affidavit and a seizure in the first instance of the defendant's property, which takes it out of the ordinary rule that the plaintiff may abandon one action without estopping himself from pursuing any other remedy which he may have against the debtor in respect of the subject matter of such action. We know of no foundation for such a distinction": *Lapp v. Ryan*, 23 Mo. App. 436; *Butler v. Hildreth*, 5 Met. 49.

So it was held by the supreme court of Indiana, in the case of *Bunch v. Grave*, 111 Ind. 351, that where a party who imagines he has two or more remedies, or who misconceives his rights, is not to be deprived of all remedy because he first tries a wrong one: See, also, *Kelsey v. Murphy*, 26 Pa. St. 78-83; *Morris v. Rexford*, 18 N. Y. 552; *Lee v. Templeton*, 73 Ind. 815. The bringing of the attachment suit had a tendency to show a waiver by plaintiff of the payment of the purchase money for the wheat, but as the writ was dismissed before judgment thereon it was no affirmance of the sale, nor was it a bar to the prosecution of this suit. Judgment affirmed. All concur.

VARIANCE.—A plaintiff may not attach for one cause of action, and, having sustained his writ, declare for another: *Hambrick v. Wilkins*, 65 Miss. 18; 7 Am. St. Rep. 631, and note.

TROVER—RIGHT OF POSSESSION.—Trover may be maintained by one who has the right of possession: *Wilson v. Hoffman*, 93 Mich. 72; 32 Am. St. Rep. 485, and note. A plaintiff, in order to maintain trover, must prove property in himself and a right of possession at the time of the conversion by the defendant: *Danley v. Rector*, 10 Ark. 211; 50 Am. Dec. 242; and note; *Turley v. Tucker*, 6 Mo. 583; 35 Am. Dec. 449, and note; *Whitlock v. Heard*, 13 Ala. 776; 48 Am. Dec. 73, and note; *Bruzier v. Ansley*, 11 Ired. 12; 51 Am. Dec. 408; *Ames v. Palmer*, 42 Me. 197; 66 Am. Dec. 271, and note; *Baxter v. Bush*, 29 Vt. 465; 70 Am. Dec. 429, and note; *Davidson v. Waldron*, 31 Ill. 120; 83 Am. Dec. 206, and note. See, also, the extended note to *Hostler v. Skull*, 1 Am. Dec. 585.

PAYMENT BY CHECK.—When a creditor takes a check for an antecedent debt it does not operate as a payment to extinguish the debt unless it is re-

received by express agreement: *Steinhart v. National Bank*, 94 Cal. 362; 28 Am. St. Rep. 132, and note; *National Bank v. Chicago etc. R. R. Co.*, 44 Minn. 224; 20 Am. St. Rep. 566, and note; note to *State Bank v. Byrne*, 37 Am. St. Rep. 335, where the cases are collected.

SALES—EFFECT OF DELIVERY OF BILL OF LADING.—Consignment of goods by a bill of lading vests the property in the consignee when made in pursuance of a prior contract with the consignee, and not otherwise: *Bonner v. Marsh*, 10 Smedes & M. 376; 48 Am. Dec. 754. See *West v. Humphrey*, 21 Nev. 80.

SALES FOR CASH—AVOIDANCE BY FAILURE OF VENDEE TO PAY.—Actual payment in good faith is necessary to complete a *bona fide* purchase: *Schloss v. Feltus*, 96 Mich. 619. Where chattels are delivered by the owner on trial, with the right to purchase them at a stated price in cash if satisfactory, the title does not pass until payment is made or waived: *McIver v. Williams*, 83 Wis. 570. Where a contract provides for the payment for chattels upon their delivery and acceptance by the purchaser, the seller is entitled, upon the failure of the buyer to pay the price for them at the time of delivery and acceptance, to rescind the contract: *Meeker v. Johnson*, 5 Wash. 718; *Cherry v. Arthur*, 5 Wash. 787; *McCombs v. McKennan*, 2 Watts & S. 216; 37 Am. Dec. 505; *Sawyer v. Chicago etc. Ry. Co.*, 22 Wis. 402; 99 Am. Dec. 49; *Chapman v. Lathrop*, 6 Cow. 110; 16 Am. Dec. 433, and note.

ELECTION OF REMEDIES—ESTOPPEL.—Where one has a choice between two inconsistent rights or remedies, and deliberately makes his choice, such election becomes conclusive upon him, and precludes him from subsequently pursuing the other right or remedy: *Crook v. First Nat. Bank*, 83 Wis. 31; 35 Am. St. Rep. 17, and note. See the extended notes to *Fowler v. Bowery Sav. Bank*, 10 Am. St. Rep. 487-494, and *Thomas v. Joslin*, 1 Am. St. Rep. 626-629.

CITY OF ST. JOSEPH v. UNION RAILWAY CO.

[116 MISSOURI, 686.]

JUDGMENTS—ESTOPPEL OF AS AGAINST INDEMNITOR.—One who is required to protect another from liability is bound by the result of litigation to which such other is a party, provided the former had notice of such litigation, and an opportunity to control its proceedings.

JUDGMENTS—CONCLUSIVENESS OF AS AGAINST INDEMNITOR.—A judgment against a party indemnified is conclusive in a suit against his indemnitor only as to the facts thereby established. The estoppel created by the first judgment cannot be extended beyond the issues necessarily determined by it.

JUDGMENTS—CONCLUSIVENESS AGAINST INDEMNITOR.—A judgment in an action against a city for injuries resulting from defects in a street caused by the failure of a car company, which is notified of the action, to comply with an ordinance requiring it to lay its tracks on a level with the street, and keep the space between them in repair, the petition alleging that such street was full of holes, that the rails of the track were several inches above the level of the street, and that, by reason thereof, plaintiff was injured, is conclusive in an action by the city against the car company to recover the amount of such judgment, only of the facts that

the street was defective as charged, and that by reason thereof plaintiff sustained damage in the amount recovered by such judgments.

JUDGMENTS—ACTION AGAINST INDEMNITOR—EVIDENCE.—In an action by a city against a car company to recover the amount of a judgment against the city in an action, notice of which was given to the company, for personal injuries, resulting, as shown by the record of that action, from holes in the street, and the fact that the track was several inches above the surface of the street, and in which an ordinance providing that the company should lay its track even with the surface of the street, and keep the space between the rails in repair, was introduced in evidence, evidence is admissible to show that the company laid, kept, and maintained its tracks in compliance with the ordinance, and the record in the first case, though admissible in evidence, does not make out a *prima facie* case in favor of the city in the second action, if such record fails to show any breach by the company of its duty under such ordinance.

JUDGMENTS—ACTION AGAINST INDEMNITOR—EVIDENCE.—In an action by a city against a car company to recover the amount of a judgment against such city in an action for personal injury caused by holes in the street, and the fact that the rails of the car track were several inches above the surface of the street, of which action notice was given to the company, the pleadings, verdict, and judgment, but not the testimony, in the first action, are admissible in evidence.

Thomas F. Ryan, and Kelley and Kelley, for the appellants.

Huston and Parrish, for the respondent.

641 BLACK, P. J. William Tippin recovered a judgment against the city of St. Joseph for \$6,000, compensation for personal injuries which he sustained by reason of a defective street. The judgment was affirmed on appeal to this court, and thereafter the city paid the judgment, and then brought this suit against the defendant, a street-car company, to recover the amount so paid to Tippin, and the costs and expenses of that suit.

Tippin alleged in his petition that Sixth street, at a designated place, was unsafe and dangerous in this, to wit: "The same was rough and uneven, and there existed in the same excavations, gullies, and holes; and in and along said street, and near the center of the traveled portion of said street, there was at said time a horse railroad track, the top of the rails of which were more than four inches above the surface of the street, all of which rendered said street defective, unsafe, and dangerous. . . . That while plaintiff (Tippin) was driving along said Sixth street in a two-horse wagon his team became frightened and ran away, and up and along said street, and ran into, and against, and upon, said holes, excavations, and gullies, and uneven places in said street, and on and against

said railroad track, and was then and there, and on account thereof, thrown out of said wagon," and injured, etc.

The instructions given in that case made the city liable if there were holes and gullies in the street, and ⁶⁴² the rails of the street-car track were several inches above the surface of the street, rendering it unsafe for travel. The jury were also told that although the city did not place the street-car rails on the street, still, if they were there, and were higher than the rest of the street, so as to make the street unsafe and unfit for use, the city was liable for injuries resulting from such defects.

On the trial of this case the city introduced evidence tending to show notice to the defendant of the institution of the former suit, and that defendant took part in the trial of that case. The city put in evidence the pleadings, verdict, judgment, and bill of exceptions in the former suit; also the following ordinance:

"The said company shall construct its track of flat iron rail from their present terminus on Market square to the southern limits of the city, as near as may be to the center, and even with the grade of the street on which it may be laid, so that the flow of water in lateral and cross gutters is not obstructed thereby, and the space between the rails shall be kept in good repair by said company, so as not to obstruct passing and crossing or traveling on said streets by other vehicles."

The city rested its case on the foregoing evidence, and the defendant moved for a nonsuit, which motion was overruled.

The defendant then offered to prove that its tracks were laid, kept, and maintained in compliance with the ordinance, but the court excluded the evidence. The court thereupon directed the jury to find for the plaintiff.

According to the ordinance read in evidence it was the duty of the street-car company to lay its track rails even with the grade of the street, and to keep the space between the rails in good repair. If Tippin was injured by the failure of the street-car company to perform these duties, or either of them, then it is liable over to ⁶⁴³ the city for the damages sustained by Tippin. This proposition is not denied by the defendant. It was said in *Strong v. Phœnix Ins. Co.*, 62 Mo. 289, 21 Am. Rep. 417, that where one is bound to protect another from liability he is bound by the result of a litigation to which such other is a party, provided he had notice of the litigation, and

an opportunity to control the proceedings. And the rule was reasserted in *Garrison v. Babbage Transp. Co.*, 94 Mo. 130. The same principle of law is thus stated in *Littleton v. Richardson*, 34 N. H. 187; 66 Am. Dec. 759: "When a person is responsible over to another, either by operation of law or by express contract, . . . and he is duly notified of the pendency of the suit, and requested to take upon him the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, . . . will be conclusive against him whether he has appeared or not." This statement of the rule was approved in *City of Boston v. Worthington*, 10 Gray, 496; 71 Am. Dec. 678. Indeed, the rule is too well settled to call for further citation of authorities.

But the judgment in the prior suit is not conclusive evidence of all matters necessary to be proved by the plaintiff in his suit against the indemnitor. Thus the question whether the relation exists which gives a remedy over is, of course, open to inquiry. Again, the judgment in the first suit is conclusive only as to the facts thereby established; for the scope of the estoppel created by the first judgment cannot be extended beyond the points and issues necessarily determined by it: 2 Black on Judgments, sec. 574.

644 Now, looking to the pleadings and the instructions given in the suit of Tippin against the city, we see the jury must have found that there were holes and gullies in the street, and that the street-car rails were higher than the surface of the street. The street-car company having been notified of the commencement of that suit, and afforded an opportunity to defend, the judgment therein is conclusive in this suit as to the following matters: 1. That the street was in an unsafe and dangerous condition because there were holes and gullies in it and the street-car rails were several inches above the surface of the street; 2. That Tippin was injured by reason of such defective condition of the street without fault on his part; and 3. That he sustained damage to the amount of six thousand dollars. But all this does not show a breach of duty on the part of the street-car company. The unsafe condition of the street may have been due entirely to the negligence of the city in failing to keep the street surface

in proper condition. It does not appear from the facts found in the first suit that the company failed to lay its track rails even with the grade of the street, or failed to keep the space between the rails in good repair. These are questions material in the present suit, but not litigated in the first suit. To the success of Tippin's suit it was not material to show that the street-car company was in fault. It was enough to show a street in an unsafe condition. Whether the company was negligent in the performance of any duty devolved upon it by the ordinance was not an issue in the first case. The questions, therefore, whether the street-car company made breach of any duty devolved upon it by the ordinance, and if it did, whether that breach caused the injury, are questions open to inquiry in this case: *Boston v. Worthington*, 10 Gray, 496; 71 Am. Dec. 678; *Littleton v. Richardson*, 34 N. H. 187; 66 Am. Dec. 645 759; *Catterlin v. Frankfort*, 79 Ind. 547; 41 Am. Rep. 627; 2 Black on Judgments, secs. 574, 575.

Applying these principles of law, it follows that the trial court rightly admitted in evidence the pleadings, verdict, and judgment in the first case. But the court erred in excluding the evidence offered by the defendant; and it erred in giving a peremptory instruction to find for the plaintiff.

The court allowed the city to read in evidence the testimony of the witnesses given on the trial of the first case, as preserved in the bill of exceptions, and in this it also erred. No doubt but parol evidence may be often resorted to for the purpose of showing the identity of the matter litigated, where the record is silent on the subject, and the evidence found in the bill of exceptions may be used for that purpose. Such evidence often becomes competent to explain the judgment where there are a number of issues, the finding upon any one of which would support the judgment: *Wright v. Salisbury*, 46 Mo. 26; *Spradling v. Conway*, 51 Mo. 51; *Hickerson v. City of Mexico*, 58 Mo. 61. But the principle can have no application here, for the petition, and the instructions given, show precisely upon what ground the jury found for the plaintiff. The facts found are, that there were holes and gutters in the street, and the car-track rails were several inches above the surface of the street. This was the theory of fact, and the only theory of fact, upon which the case was submitted to the jury. All this is shown by the pleadings and the instructions given, and there was no occasion for resorting to further evidence to show what was litigated in the first suit.

In view of a new trial, it may be added that the burden of proof is upon the city to show that the street-car company was in fault because of a failure to comply with the ordinance, and the record in the first suit does not make out a *prima facie* case for the city on this ⁶⁴⁶ issue. The judgment is reversed, and the cause remanded. The other judges concur. Barclay, J., expressing no opinion on that point wherein it is held by the foregoing opinion that the court erred in permitting the plaintiff to read in evidence, on the trial of this case, the evidence contained in the bill of exceptions filed in the first case.

JUDGMENTS—WHEN CONCLUSIVE UPON INDEMNITORS.—This question will be found thoroughly treated in the extended notes to *Robinson v. Basins*, 22 Am. St. Rep. 204–207; *Stephens v. Shafer*, 33 Am. Rep. 802, and *Charles v. Hoskins*, 83 Am. Dec. 385; and in the latter note see, especially, the discussion at page 387, where the liability over to cities and towns of persons responsible for defective highways is treated.

SCHANEWERK v. HOBERECHT.

[117 MISSOURI, 22.]

TRUST DEEDS—SALES UNDER.—A power of sale contained in a deed of trust must be strictly followed to render its exercise valid, and a sale at a place other than that designated in the deed does not deprive the grantor of the right to redeem.

TRUST DEEDS—PLACE OF SALE.—A power of sale contained in a trust deed, providing that the sale “shall be made at the courthouse door,” means that one sale of the property shall be made at the door of one particular courthouse, and not that several sales shall be made at different times, at the door of several courthouses.

TRUST DEEDS—SALES UNDER.—A deed pursuant to a sale under a power contained in a trust deed not made at the place designated therein passes the legal title, and is a good defense, as an outstanding title, to an action of ejectment brought by a purchaser at a subsequent foreclosure sale, under the trust deed against the grantor therein.

TRUST DEEDS.—POWER OF SALE contained in a trust deed, in which the legal estate has been conveyed to the trustee to secure a debt due to a creditor, is not a mere naked authority, but a power coupled with an interest, and is irrevocable by the grantor.

TRUST DEEDS—SALES AND CONVEYANCES BY TRUSTEE.—If a trustee, holding property under a trust deed containing a power of sale, conveys the property, even in breach of the trust, he extinguishes his power, and a subsequent sale by him is void. The title thus first conveyed by him becomes absolute in his vendee in a court of law.

E. J. Smith, for the appellant.

J. H. Lay and P. D. Hastain, for the respondent.

²³ BRACE, J. This is an action in ejectment for two lots in the town of Cole Camp, Benton county. The petition is in common form, and the answer is a general ²⁴ denial. Trial before the court without a jury, and judgment for the plaintiff. The defendant brings the case here by writ of error.

The plaintiff to show title, first, read in evidence a deed of trust duly executed by the defendant, bearing date the 24th of April, 1883, conveying the premises to Garret Keiffer in trust to secure the payment of three promissory notes of the same date, executed by defendant to Henry Mahnkin and Claus Mahnkin, each for the sum of nine hundred and thirty-three dollars and thirty-five cents, payable one, two, and three years after date; and in default of payment, the said trustee, "or in the event of his sickness, death, or absence from the county of Benton, or other disability or refusal to act," the sheriff of said county, "upon request of the holder," was therein authorized to sell the premises "at public vendue for cash at the courthouse door in the county of Benton, first giving twenty days' notice," etc.; next, a deed from John W. Payton, sheriff of Benton county, acting under said deed of trust on account of the refusal of the trustee therein named to act, dated January 30, 1888, conveying the premises to plaintiff in pursuance of a sale that day made by him thereof in compliance with the power conferred in said deed of trust.

To defeat the plaintiff's recovery upon this title, by showing an outstanding title in another, the defendant read in evidence a deed from said trustee, dated June 23, 1885, executed in pursuance of a sale made that day by him to one Frank Schanewerk in compliance with the terms of said deed of trust, and recorded August 31, 1885; and offered to read in evidence a deed recorded the same day from V. Newell, sheriff of said county, dated July 24, 1885, conveying the premises to the said Frank Schanewerk, executed in pursuance of a sale made by said sheriff on that day, duly advertised by the trustee in accordance with the requirements of said ²⁵ deed of trust, but which sale the said trustee refused to make. This deed was excluded by the court on the objection of the plaintiff, for the reason that it showed that the land was advertised by the trustee and the sale made by the sheriff.

The plaintiff in rebuttal introduced parol evidence tending to prove that for many years there stood in the courthouse square, in the town of Warsaw, a courthouse erected by said

county, in which all its courts were regularly held; also a small house of one room, some fifty to seventy-five feet from the courthouse, used as a county clerk's office. That, for several years prior to the sale by Keiffer, the trustee, to Frank Schanewerk in 1885, "said courthouse had been abandoned and torn down, not even the foundation remaining." That after the abandonment of said courthouse the county court held its sessions in said county clerk's office, and the circuit court held its sessions in a building known as the Christian church, situate "across one block and two streets from said courthouse square" in said town. This was the situation when the sales were made to Frank Schanewerk, except that it was also shown that at that time there was another small one-roomed building in the square used as a circuit clerk and recorder's office.

The property was first offered for sale in front of the county clerk's office between one and two o'clock P. M., there being present about fifteen persons; and "bid off" by one P. D. Hastain, who refused to pay for it. About two or three hours afterwards, and when there was present only about one-third of the number as at the first offer, the property was again offered for sale at the same place, and knocked off to the said Frank Schanewerk upon his bid of five hundred dollars. Thereupon the trustee announced that he would sell said property also at the church, and he and all the crowd, except Hastain, repaired to the church, and the property was again offered for sale at the door of said church, and bid off by Frank Schanewerk for five hundred dollars. And in pursuance of these proceedings the deed of June 23, 1885, was made to him. At the time the sales were being made no court of any kind was being held in the county clerk's office or in said church building.

It was also shown that Newell who, as sheriff and trustee, made the second deed offered in evidence but rejected by the court, sold the property both in front of the county clerk's office and at said church, and that it was bid off at both places by Frank Schanewerk at five hundred dollars.

The power of sale given in the deed of trust was restricted to a sale "at the courthouse door in the county of Benton," the time of which sale had been previously advertised for twenty days. This power is the creature of contract, and not of law, and must be strictly followed, in order to render its exercise legitimate. The evidence shows that at the time the

sale was made the old courthouse had been torn down and not a vestige of it remained, and that the new one afterwards erected upon the same site had not yet been built. But it does not show what the situation was when the deed of trust was made. So that, conceding that we might resort to the circumstances attending the transaction for assistance in ascertaining the intention of the grantor, we have nothing to go to in this case except the deed. The letter of the deed is that the sale must be made at the courthouse door, i. e., that one sale of the property shall be made, at one door, of one particular courthouse; not that several sales shall be made at different times, at the door of several courthouses, as was attempted in this case.

The old county clerk's office in the public square in which the county court held its sessions might, for ²⁷ some of the purposes of that court, be called a courthouse, and the church temporarily provided for the circuit court to hold its session in, might (at least when that court was in session) be held to be the courthouse for judicial proceedings in that court: *Kane v. McCown*, 55 Mo. 181; *Bouldin v. Ewart*, 63 Mo. 331. But it must be remembered that we are here dealing with a power created in a private contract, by a person using language in its usual and ordinary signification, and when he says "courthouse in Benton county," nothing else appearing, he means the house provided by the county for the purpose, and in which are held the sessions of the various courts of the county: *Hambricht v. Brockman*, 59 Mo. 52, and in which are generally the offices of the county officials. For that is the meaning usually and ordinarily given to the term "courthouse in a county of Missouri."

The evidence in this case discloses that not one of the sales of the property made prior to the one under which the plaintiff claims was made at the door of the courthouse in Benton county as thus defined, unless a part can be made equal to the whole. In the recent case of *Stewart v. Brown*, 112 Mo. 171, in which four opinions were delivered in court in Bank, the questions briefly discussed in this paragraph were very deliberately considered and the previous decisions reviewed, and we are all agreed that none of the sales to Frank Schanewerk in this case can be upheld under that or any of the previous decisions of this court.

It may be conceded, then, that if this were an action of ejectment by Frank Schanewerk, the first purchaser, against

the defendant, the grantor in the deed of trust in possession, in which he had set up the facts proven herein by parol evidence to defeat a recovery on the ground that his equity of redemption had not been foreclosed with an offer to redeem, the defense would ²⁸ have been a good one under the decisions of this court, for the reason that the *prima facie* case made by the trustee's deed would have been overcome by showing that the sales to Frank Schanewerk were not made at the place contemplated by said deed of trust.

But that is not this case. Here the defendant, the mortgagor in possession, makes no complaint of the sale under the power given by him. On the contrary, he asserts the validity of that sale by setting up the outstanding title acquired under it against the plaintiff's title acquired by a subsequent sale and deed under the same deed of trust. And the only question in the case is, which one of the two, Frank Schanewerk or William Schanewerk, has the legal title to the premises? With the equities of any person against that legal title we have nothing to do. For the purposes of this case the defendant stands in the shoes of Frank Schanewerk, claiming under his legal title nothing more and nothing less, and the plaintiff claims the legal title under his subsequent trustees' deed, and nothing else. The deeds of each from the trustee are properly executed, show in each case on their face an execution of the power granted in strict compliance with the terms of the deed of trust, and that of Frank Schanewerk, being first in point of time, had the effect of transferring to him the legal title as between these two deeds. Whatever equities that title may be subject to in his hands, the plaintiff sets up none in his pleadings, and shows none by his evidence superior to those of Frank Schanewerk, for they each bought in market overt at a sale at which the rule *caveat emptor* obtains, and the plaintiff with the record of Frank Schanewerk's prior deed staring him in the face.

The whole force of the plaintiff's parol evidence in rebuttal was to show an equitable defense of the defendant against the outstanding title upon which the ²⁹ defendant relied to defeat plaintiff's claim of legal title. It goes without saying that this defense belonged to the defendant, and not to the trustee, who sold the *cestui que trust*, at whose instance he sold, nor to the plaintiff, who, at the subsequent sale, purchased from the trustee with record notice of such sale, and the conveyance of the legal title in pursuance thereof. What-

ever equities there are in the case growing out of the facts shown in evidence are the equities of the defendant against the legal title of Frank Schanewerk, upon which title the defendant stands, and not of the plaintiff, with which, however, as before said, we have nothing to do, the only question being: Did Frank Schanewerk, by his deed, get the legal title of defendant, grantor in the deed of trust? If he did, then the plaintiff got none by his subsequent deed, and the finding and judgment should have been for the defendant. A power of sale in a deed of trust, in which the legal estate has been conveyed to the trustee to secure a debt due a creditor, is not a mere naked authority, but a power coupled with an interest, and is irrevocable by the grantor: 2 Am. Law Reg., N. S., 654; 2 Perry on Trusts, 4th ed., sec. 602 h; 2 Jones on Mortgages, 4th ed., sec. 1792.

"The mortgagee in a deed of mortgage and the trustee in a deed of trust take the legal title and estate for the purposes of their security. In all cases the legal title is in the trustee under the trust deed, if the deed purports to convey the estate": 2 Perry on Trusts, sec. 602 i. "The legal estate being thus in the mortgagee or trustee for the purpose of the security, the power of sale is a power appendant to the estate itself and takes effect out of it. If the mortgagee or trustee ceases in any way to have an interest in the estate he ceases to have any power over it. If, therefore, they totally alienate the estate to which the power³⁰ is appendant, they extinguish the power. If a trustee conveys the property even in a breach of the trust, he extinguishes his power, and a subsequent sale will be void. But a court of equity can give relief from fraud and breaches of trust": 2 Perry on Trusts, sec 602 k. "In a conveyance to a trustee or mortgagee the title as between the grantor or mortgagor and the trustee passes to the trustee or mortgagee. A trustee who has the fee in himself may convey it even if the conveyance is a breach of the trust, and his grantee takes a title upon which he can maintain actions at law. And so it is said that although a trustee may convey the legal title in breach of the trust, and without complying with the power, yet the grantee will take a title good at law": 2 Perry on Trusts, sec. 602 aa. "This rule is founded upon a general principle, and prevails in all the states . . . except in New York, which converts the title of a trustee into a power by forbidding and making void all sales in breach of the trust": 2 Perry on Trusts, sec. 602 aa, note 1. The gen-

eral principle being that "the legal estate in the hands of a trustee has at common law precisely the same properties, characteristics, and incidents, as if the trustee were the absolute beneficial owner": 1 Perry on Trusts, sec. 321.

This principle has been recognized in this state, *Gale v. Mensing*, 20 Mo. 461; 64 Am. Dec. 197; *Hannibal etc. R. R. Co. v. Green*, 68 Mo. 169; *Bowlin v. Furman*, 28 Mo. 427. In the last case, Scott, J. said: "It cannot be questioned that the deed of a trustee conveys a legal title. The trustee having a legal, though defeasible, title, that title becomes absolute in his vendee in a court of law. In a court of law the vendee need not show that the conditions of the trust deed have been complied with. . . . Although there is now no distinction between courts of law and equity, yet if a party under the present system will file a petition which formerly only ²¹ entitled him to a legal remedy, he cannot now under such a petition have any other than the remedy he formerly had. If he would have equitable relief he must set out in his pleading the facts which give him title to it." And Bliss, J. in *Johnson v. Houston*, 47 Mo. 227, says: "The plaintiffs have no equity, but rely solely upon the legal title of Mrs. Johnson. That she once held the title is clear. But in a mortgage, or a deed of trust in the nature of a mortgage, the legal title after condition broken passes to the mortgagee or trustee. Such is the general law though modified in New York by the statute forbidding ejectment by the mortgagee, and such is the law of Missouri: *Walcop v. McKinney*, 10 Mo. 229; *Meyer v. Campbell*, 12 Mo. 603; *Sutton v. Mason*, 38 Mo. 120; *Hubble v. Vaughan*, 42 Mo. 138. These cases arose under common mortgages, but a deed of trust is also an absolute conveyance upon its face, with the same condition of avoidance if the debt is paid; and the addition of a power to sell without judicial proceedings to foreclose certainly cannot avoid the legal effect of the grant."

The principles announced in these authorities have never been directly questioned. Applied to the case in hand, it must be held that the trustee's deed of Keiffer, of August 31, 1885, to Frank Schanewerk, vested in him the legal title to the premises in question, although in a court of equity in a proper proceeding, the sale, upon the facts shown by the parol evidence of the plaintiff, might be held to be void, and the deed so declared, or treated, as to a party having a right to invoke the powers of that court for his protection

against such sale and deed. The only doubt as to the correctness of such a conclusion arises from the fact that in some cases of that character, in the opinions rendered, it is too broadly stated or assumed, in one form or another, "that where a power in a deed of trust ²² has not been executed in accordance with essential conditions, the sale, and deed, will be held to be utterly void, both at law, and in equity." As, for example, *Thornburg v. Jones*, 36 Mo. 514; *Powers v. Kueckhoff*, 41 Mo. 426; 97 Am. Dec. 281; *Eitelgeorge v. Mutual House Building Assn.*, 69 Mo. 52; *Goff v. Roberts*, 72 Mo. 570; *Long v. Long*, 79 Mo. 644; *Siemers v. Schrader*, 88 Mo. 20; *Ohnsorg v. Turner*, 13 Mo. App. 533; 87 Mo. 127.

In the last case one of the grounds upon which an injunction was refused restraining a second sale by the trustee under a deed of trust, where it appeared upon the face of the trustee's deed that the first sale made thereunder was not made in conformity with the requirements of the trust deed, was, that the trustee's deed was an absolute nullity, and cast no cloud upon the title. While the case in hand is distinguishable from the *Ohnsorg* case, in that the trustee's deed here under the first sale shows a sale in strict compliance with the requirements of the deed of trust; yet if the conclusion we have reached is correct, the first deed in that case did cast a cloud upon the title, although the sale was void, and its existence furnished ground for the interposition of chancery power.

In *Goff v. Roberts*, 72 Mo. 570, it was ruled that in an action of ejectment, under a general denial, it might be shown that the sale under a deed of trust was made at a place other than that designated in the deed in order to defeat a recovery. If the conclusion we have here reached is correct, that ruling was also incorrect.

As to the *dicta* in the other cases, it is only necessary to say that the authority cited for them, in the main, is the early case of *Stine v. Wilkson*, 10 Mo. 75, which does not warrant them, the point ruled there being (as stated in the *syllabus*) that "chancery has jurisdiction ²³ to control the acts of a trustee, under a deed to secure the payment of money; and where the powers conferred on the trustees are not strictly pursued will set aside his sales."

It follows from what has been said that the judgment ought to be reversed, and the cause remanded, and it is accordingly so ordered.

All concur except BARCLAY, J., not voting.

TRUSTS—EFFECT OF IRREGULAR SALES BY TRUSTEES.—A trustee may divest himself of the legal title without compliance with the conditions of the trust, but a sale and deed, except in strict compliance with such conditions, are of no effect whatever so far as the trustor's equitable estate is concerned: *Stephens v. Clay*, 17 Cal. 489; 31 Am. St. Rep. 328, and note. Sales and conveyances by trustees are subjects of the exhaustive monographic note to *Tyler v. Herring*, 19 Am. St. Rep. 266-297.

IN RE THOMPSON.

[117 MISSOURI, 88.]

CONSTITUTIONAL LAW—VAGRANCY—INVOLUNTARY SERVITUDE.—A statute authorizing a vagrant, not accused of crime, to be hired for a specified period to the highest bidder, after a finding of the fact of vagrancy by a jury, is void, as being in conflict with both the state and federal constitutions prohibiting "slavery or involuntary servitude except in punishment of crime whereof the party shall have been duly convicted."

HABEAS CORPUS for the release of a negro who was arrested and charged with being a vagrant, and brought before a justice of the peace. A jury being summoned, the defendant was by it found to be a vagrant, in accordance with the evidence adduced. The justice then issued a warrant to a constable of that township commanding him, after three days' public notice, to hire the defendant for six months to the highest bidder for cash. In the mean time the defendant petitioned the supreme court for a writ of *habeas corpus*. The proceeding under which defendant was found to be a vagrant was had under chapter 169, 2 Revised Statutes of Missouri, 1889, which, so far as here material, is as follows: "SEC. 8846. Every able-bodied person who shall be found loitering about without visible means of support and maintenance, and who does not apply himself to labor, or some other honest calling to procure a livelihood, and all able-bodied persons who are found begging, or who quit their houses and leave their wives and children without the means of subsistence, shall be deemed and treated as vagrants." "SEC. 8848. When any such person is found, any justice of the peace of the county shall, upon information, or from his knowledge, issue his warrant to the sheriff or constable to bring such person before him." "SEC. 8849. If upon examination it shall appear that such person is a vagrant, the fact of vagrancy having been established by the verdict of a jury, summoned and sworn to inquire whether the person be a vagrant or not, the justice shall

make out a warrant directing the sheriff or constable to keep such person in his custody until three days' notice can be given by advertisement, set up in the most public places in the county, of the hiring out of such vagrant, at the courthouse door in said county, for the term of six months, to the highest bidder, for cash in hand." Section 3841, spoken of in the opinion, reads as follows: "Sec. 3841. Every person who may be found loitering around houses of ill-fame, gambling-houses, or places where liquors are sold or drank, without any visible means of support, or shall attend or operate any gambling device or apparatus, or be engaged in practicing any trick or device to procure money or other thing of value, or shall be engaged in any unlawful calling whatever, and every able-bodied married man who shall neglect or refuse to provide for the support of his family, and every person found tramping or wandering around from place to place without any visible means of support, shall be deemed a vagrant, and, upon conviction thereof, shall be punished by imprisonment in the county jail not less than twenty days, or by fine not less than twenty dollars, or by both such fine and imprisonment."

F. W. Lehmann, E. S. Gantt, George S. Grover, and George Robertson, for the petitioner.

R. F. Walker, attorney general, for the state.

S⁷ SHERWOOD, J. The validity of the warrant of commitment is questioned by petitioner's counsel on two grounds: 1. On the ground that the statutory provisions first above quoted have been repealed by necessary **S⁸** implication resulting from the enactment of section 3841, *supra*; and 2. That if not thus repealed that they are unconstitutional. Counsel for the state denies that chapter 169 has been repealed in consequence of the enactment of section 3841, and insists that the statutory provisions under which petitioner was found to be a vagrant are not obnoxious to any constitutional objections.

Where one statute on any given subject is in existence, and another statute is passed on the same subject, but with different provisions, but yet not covering, perhaps, the whole subject embraced in the first one, and no repealing words are used, it is sometimes quite difficult to determine whether the first statute is repealed in whole or only in part, or whether the provisions of the second statute are merely cumulative in character. This difficulty confronts us in the present instance.

If, however, chapter 169, a part of which has been quoted, has been repealed as a result of the subsequent enactment, then clearly the justice was without jurisdiction in the premises; the same effect follows if the statute on which his authority is supposed to rest is violative of the organic law.

This being the case, it is thought best to assume, for the purpose of this discussion, that the position of the state is correct—that chapter 169 has not been repealed—as by so doing the merits of this cause can be more satisfactorily reached than if the discussion should proceed on the theory that the statute in question were no longer in force in consequence of the passage of the subsequent act; and should it be determined that chapter 169 is invalid on constitutional grounds, then of course all necessity for determining its repeal or non-repeal is thereby obviated.

Pursuing the course indicated, let comparison be instituted between the statute and the constitution in ⁸⁹ order to settle the question whether the former is in conflict with the latter.

Section 2 of article 1 of the constitution of this state adopted July 4, 1865, declares “that there cannot be in this state either slavery or involuntary servitude, except in punishment of crime, whereof the party shall have been duly convicted.”

This section has now become section 31 of article 2 of our present constitution, and is substantially a literal transcript of a like provision contained in the ordinance of 1787, penned by the hand of Thomas Jefferson, and this in substance is section 1 of the thirteenth amendment to the constitution of the United States.

That petitioner has been guilty of no crime stands conceded by the state, as indeed it must have been, considering the terms of the statute under which proceedings were had against him. That those proceedings, if allowed to reach their anticipated and ultimate development, would result in the imprisonment of the petitioner, in his being subjected to involuntary servitude and to punishment, is equally clear, for imprisonment occurs whenever another is detained or deprived of the power of locomotion against his will; involuntary servitude is but the condition of a person compelled to do service for another, and punishment is “the penalty for transgressing the law”: Wharton’s Law Dictionary; or it is any evil or inconvenience consequent upon crime or misdemeanor: 4 Blackstone’s Commentaries, 7.

So that the constituent elements of this case are: Imprisonment, punishment, and involuntary servitude without any charge, proof, or legislative enactment establishing the act of petitioner to have been a crime.

The question then is, can a statute which authorizes such proceedings as are here brought under review stand before the prohibitions of our state and federal constitutions? In this investigation it is needless to ⁹⁰ cite authorities like that of *Byers v. Commonwealth*, 42 Pa. St. 89, which assert familiar rulings in regard to the arrest and commitment of vagrants, or professional thieves when about to ply their vocation, for in those cases the constitutional point now in hand was neither involved nor passed upon. Precedents precisely in point have not been found, but petitioner's counsel have cited some cases which are analogous to the present one.

Thus in an early case in Indiana it was ruled that though an adult negress had voluntarily bound herself by indenture and for a valuable consideration to serve the obligee for the term of twenty years, yet it would not be enforced upon her, because to do so would be to impose upon her "involuntary servitude" in violation of the constitution of that state: *Clark's case*, 1 Blackf. 122; 12 Am. Dec. 213.

In *Turner's case*, 1 Abb. (U. S. C. C.) 84, the petitioner was a young negress who was indentured to her former master until she should become eighteen years of age. Under the law of Maryland, persons thus apprenticed were allowed to be assigned and transferred at the will of the master to any person in the county, the authority of the master over such an apprentice was described as a "property and interest," and in other important particulars differed from indentures prescribed for white apprentices, and upon this it was held on *habeas corpus* that such an apprenticeship was involuntary servitude within the meaning of the first clause of the thirteenth amendment of the federal constitution, and the petitioner was discharged.

In the *Slaughter Houses cases*, 16 Wall. 36, and in the *Civil Rights cases*, 109 U. S. 36, it was held that while the thirteenth amendment was primarily intended to abolish African slavery, yet it was broad enough to extend, and did extend, to every form of involuntary ⁹¹ servitude within the United States, or within their jurisdiction whether the rights involved were those of the white or of other races. Touching the amendment now under discussion, an eminent jurist says:

“Throughout the land involuntary servitude is abolished by constitutional amendment, except as it may be imposed in the punishment of crime. Nor do we suppose the exception will permit the convict to be subjected to other servitude than such as is under the control and direction of the public authorities in the manner heretofore customary. The laws of the several states allow the letting of the services of the convicts, either singly or in numbers, to contractors who are to employ them in mechanical trades in or near the prison, and under the surveillance of its officers; but it might well be doubted if a regulation which should suffer the convict to be placed upon the auction block and sold to the highest bidder, either for life or for a term of years, would be in harmony with the constitutional prohibition”: Cooley on Constitutional Limitations, 6th ed., 363.

In this case it will be observed that just what Judge Cooley supposed might be within the range of possibility would have occurred but for the intervention of this court. The case he puts, however, is in relation to suffering a “convict to be placed on the auction block and sold to the highest bidder.” If such a proceeding would fall under the ban of constitutional prohibitions, then *a fortiori* would a like result follow where, as here, the proposed object of sale has not been so much as accused of crime.

The “convict” may lawfully be condemned to involuntary servitude, to imprisonment in punishment of his crime; not so with one in similar circumstances to those of petitioner. Doubtless he might be proceeded against and punished under the provisions of ⁹³ section 3841, which makes the act of being a vagrant punishable as a crime; but in no other way, if obedience is due to express constitutional prohibitions.

The premises considered, we hold that the law under which petitioner is restrained of his liberty contravenes the constitution of the United States and of this state, and he is therefore entitled to be discharged, and it is so ordered. All concur.

VAGRANCY.—Statutes relating to vagrancy usually define a vagrant to be an idle person who roams about from place to place without any certain calling, begging, or living without labor or visible means of support. This is also the common-law definition. Vagrancy, then, is distinguished from disorderly conduct and breaches of the peace, and includes only such cases of vagabondage as are known to the common law. Its statutory definition cannot be enlarged by municipal ordinance: *In re Way*, 41 Mich. 299.

Statutes Designed to Suppress Vagrancy, if in derogation of the right to a fair and public trial and to protection against oppressive and irregular action,

must be strictly construed: *In re Way*, 41 Mich. 299; *People v. Turner*, 55 Ill. 280; 8 Am. Rep. 645.

A statute authorizing two overseers of the poor, by writing, under their hands, to commit vagrants and paupers to the workhouse without trial is void, as being in violation of the fourteenth amendment to the constitution of the United States: *Portland v. Bangor*, 65 Me. 120; 29 Am. Rep. 681. Although it has been held that the state has no power to commit a child who is guilty of no crime to a reform school on the mere allegation that he is destitute of proper parental care, and is growing up in mendicancy, ignorance, idleness, and vice: *People v. Turner*, 55 Ill. 280; 8 Am. Rep. 645; yet it is now well settled by numerous cases in Illinois, as well as in other states, that the commitment of dissolute and vagabond children to industrial or reform schools, without trial by jury or conviction of crime, does not deprive them of their personal liberty in a constitutional sense. Under statutes of this character due provision is always made for the protection of all just rights, and the institution is not a prison, but a school. The sending of children there to be taken care of under a proper manager or guardian, who otherwise has no control over them, is not to be regarded as punishment. The restraint of liberty in such institution is no more than is found in any well-regulated school. Such degree of restraint is necessary to the proper education of such children, and is in no sense an infringement on the inherent and inalienable right of personal liberty: *In re Ferrer*, 103 Ill. 367; 42 Am. Rep. 10; *County of McLean v. Humphreys*, 104 Ill. 378; *Milwaukee Industrial School v. Supervisors*, 40 Wis. 328; 22 Am. Rep. 702; *Roth v. House of Refuge*, 31 Md. 329; *People v. New York Catholic Protectory*, 101 N. Y. 195; *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197; *Farnham v. Pierce*, 141 Mass. 203; 55 Am. Rep. 452; *Ex parte Crouse*, 4 Whart. 9. Under a statute empowering a grand jury to make a return in writing, authorizing the commitment of a minor who is vicious, idle, and abandoned to a "state reform farm," without trial, the court said: "The proceeding is purely statutory, and the commitment, in cases like the present, is not designed as a punishment for crime, but to place minors of the description, and for the causes specified in the statute, under the guardianship of the public authorities named, for proper care and discipline, until they have reformed or arrive at the age of majority. The institution to which they are committed is a school, not a prison; nor is the character of their detention affected by the fact that it is also a place where juvenile convicts may be sent who would otherwise be condemned to confinement in the common jail or penitentiary: *Prescott v. State*, 19 Ohio St. 184-188; 2 Am. Rep. 388.

Right to Trial by Jury.—A statute conferring jurisdiction upon a justice of the peace to try, convict, and commit to a prison, or house of correction, vagrant or disorderly persons, without the intervention of a jury, is constitutional, and not in violation of the constitutional guarantee of trial by jury. The declaration that an accused "party is entitled to a speedy trial by an impartial jury must be understood as referring to such crimes and accusations as have, by the regular course of the law and the established modes of procedure, as heretofore practiced, been the subjects of jury trial. It could never have been intended to embrace every species of accusation involving either criminal or penal consequences." The exercise of such summary jurisdiction, and the infliction of the punishment prescribed by the statute in such cases, without a trial by jury of twelve men, is not regarded anywhere as being in violation of fundamental guarantees of the rights and liberties of the people: *State v. Glenn*, 54 Md. 572-599 et seq., where the ques-

tion is reviewed at great length; *Commonwealth v. Holloway*, 5 Binn. 516. If the statute provides that upon an accusation of vagrancy the accused shall be tried by a jury composed of a less number than twelve, it is constitutional, and the accused is not entitled as of right to be tried before a common-law jury composed of twelve men: *Allen v. State*, 51 Ga. 264; *In re Ferrier*, 103 Ill. 367; 42 Am. Rep. 10. In the latter case it was said: "This is not a proceeding according to the course of the common law, in which the right to a trial by jury is guaranteed, but the proceeding is a statutory one, . . . and 'in those cases which were not formerly triable by jury, if the legislature provide for such trial now, they may doubtless provide a statutory tribunal composed of any number of persons, and no question of constitutional power or right could arise.'" Cooley on Constitutional Limitations, 312, is to the same effect.

SUFFICIENCY OF INDICTMENT.—An indictment charging vagrancy is not sufficient if it merely charges that the accused is a vagrant within the meaning of the law. The statutory constituents of the offense must be alleged in plain and intelligible words, so as to apprise the accused of the charge against him: *Weldon v. State*, 12 Tex. App. 117. An indictment which alleges that defendant, having no visible means of support, did unlawfully fail, refuse, and neglect to apply himself to some honest calling, and did loiter around drinking-saloons and gambling-houses, is good and sufficient generally to charge vagrancy: *Brown v. State*, 2 Lea, 158; *State v. Cummins*, 78 Ind. 251. Under a statute which enumerates in several groups certain acts which shall constitute vagrancy, an indictment charging all of the acts specified in one of these groups is sufficient, although it also states some of the additional acts specified in other and independent groups: *Ex parte McCarthy*, 72 Cal. 384. An indictment for vagrancy, charging that defendant, "having a family, did abandon his family, and left and leaves them in danger of becoming a burden to the public," is insufficient; it should also charge his ability to contribute to their support by his means, or, being an able-bodied person, by his industry: *Boulo v. State*, 49 Ala. 22. The indictment should also charge that the defendant is able to labor, and that he or she neglects to apply himself or herself to some honest occupation. And in charging that he or she is endeavoring to maintain himself or herself by unlawful means, the indictment must state what the unlawful means are: *State v. Custer*, 65 N. C. 339.

SUFFICIENCY OF EVIDENCE.—Under an indictment for vagrancy, the evidence in order to justify a conviction must satisfactorily show that the accused being able to work failed and refused to do so within the period stated in the indictment, and that he had no visible means of support: *Hicks v. State*, 76 Ga. 326. Evidence in other elements sufficient which only shows that the defendant "looked as though he was able to work" will not support a conviction: *Walters v. State*, 52 Ga. 574. Satisfactory proof that a female is a common prostitute and idle person is not sufficient to authorize her conviction, as under the statute it must also be proved that such person has no lawful employment whereby to maintain herself and no visible means of support: *People v. Forbes*, 4 Park. C. C. 611. Evidence that an incorrigible son disobeys the lawful commands of his mother, and absents himself from home without her consent is not sufficient to convict him of vagrancy: *In re Conroy*, 54 Hew. Pr. 432. A minor supported by her parents who have an honest occupation cannot be convicted of vagrancy on proof that she is a lewd woman alone: *Taylor v. State*, 59 Ala. 19. Evidence

showing that for two years the defendant has been able to work, but has not worked, and that he has no property to support him, is sufficient to sustain a conviction of vagrancy: *Price v. State*, 67 Ga. 723.

Evidence that for a certain period prior to the trial the defendant was an idle person without visible means of support, living, without lawful employment, in a bawdy house and doing nothing but walking on the street with other girls from such house, is sufficient to authorize a conviction of vagrancy: *Commonwealth v. Carter*, 108 Mass. 17. It is sufficient in cases of vagrancy to prove that the offense charged was committed during a substantial part of the time named in the indictment: *Commonwealth v. Lord*, 147 Mass. 399.

Arrests for Vagrancy Without Warrant are generally unlawful and can rarely be justified: *In re Way*, 41 Mich. 299.

False Imprisonment.—If the statute expressly confers jurisdiction of the offense of vagrancy upon justices of the peace, and authorizes the commitment of the offender, such commitment is not unlawful and does not constitute false imprisonment: *Wolcott v. Bachman*, 3 Wyo. 336.

Vagrancy as Ground for Divorce.—Under a statute making a vagabond husband's failure to support his family, though physically able to do so, a ground for divorce, the fact that he fails to support a member of his family, for reasons justifiable or otherwise, is not ground for divorce: *Dwyer v. Dwyer*, 26 Mo. App. 647.

LEONARD v. SPARKS.

[117 MISSOURI, 103.]

JUDGMENTS BY DEFAULT—COLLATERAL ATTACK—NOTICE.—A judgment by default in a condemnation proceeding in which the defendant was personally served with process five days before the return day is not subject to successful attack collaterally on the ground that the statute requires "at least six days' notice."

JUSTICES' JUDGMENTS—JURISDICTION—PRESUMPTION.—If the facts touching the acquisition of jurisdiction are fully disclosed, judgments of justices of the peace, so far as collateral attack is concerned, are regarded no less favorably than those of courts having more extensive powers.

EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—COLLATERAL ATTACK.—Proceedings of a judicial nature to acquire land for a public use, when collaterally attacked, are to be viewed and construed with the benefit of the same presumptions of validity and regularity ascribed by law to other proceedings before the same courts or officers.

EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—COLLATERAL ATTACK.—Although the record and judgment in proceedings to open a street do not affirmatively show that the jury was composed of "disinterested freeholders," as required by law, yet such proceedings are presumed to be regular, and the judgment cannot be collaterally attacked.

PUBLIC OFFICERS, PRESUMPTION IN FAVOR OF ACTS OF.—In the absence of any showing, it is presumed that a public officer's action is correctly taken, and that he has complied with all the requirements of law.

Karnes, Holmes, and Krauthoff, and McDougal and Sebres,
for the appellant.

D. D. Duggins, for the respondent.

¹⁰⁷ BARCLAY, J. October 5, 1887, defendant sold to plaintiff a piece of land in Kansas City, Missouri, by deed of general warranty with covenants implied by the words "grant, bargain, and sell": Rev. Stats., 1879, sec. 675; Rev. Stats., 1889, sec. 2402.

The present action is based on those covenants, to recover of defendant the amount of certain special taxes paid by plaintiff in 1888, to relieve the land of the lien imposed thereby.

These special taxes were for "benefits" assessed against the property in a proceeding to open a street in Kansas City.

The only issue in the case is that of the validity of the special taxes. Defendant claims that the proceedings in which they were levied are wholly void as to Mr. Bouton, who then was the owner of the land, and to whom defendant was successor in title. That claim was submitted to the circuit court upon a stipulation in the nature of an agreed case, the essential features of which will appear. The court found for defendant, and the plaintiff took the ruling to the Kansas City court of appeals for review. The judges of that court did not agree in their conclusions upon it, and certified the case to the supreme court in accordance with the constitutional directions on that subject: Constitutional Amendment, 1884, sec. 6.

The condemnation proceedings in question were founded upon the Kansas City charter of 1875 (Sess. ¹⁰⁸ Laws, 1875, p. 196, and following). Two main objections are urged against them, it being conceded that in other respects they were regular throughout.

1. It is said that the assessment of benefits is void because the owner of this property was served with process five days before the day named for his appearance, while the charter required "at least six days'" notice: Sess. Acts., 1875, sec. 2, p. 245.

The proceedings were taken under an ordinance of the city of Kansas, January 18, 1887, to open Elma street, and followed the usual course; first, before the mayor, and later in the circuit court, upon an appeal thereto by one of the other parties. Mr. Bouton did not at any time appear in the case in response to his notice. Finally a judgment was rendered, confirming the verdict of a jury which had assessed damages in favor of the parties whose land was acquired for public use, and various items for "benefits" against property in the vicinity, including that of Mr. Bouton.

From the most casual glance at the record, it appears that the proceeding was one of a class which the mayor and circuit court had power to hear and determine. It was a case involving the use of that judicial power committed by law to those functionaries. They had jurisdiction of its subject matter, according to the principles declared in many decisions: *Walker v. Likens* (1857), 24 Mo. 298; *Patten v. Weightman* (1873), 51 Mo. 432; *Hagerman v. Sutton* (1887), 91 Mo. 531.

But was complete jurisdiction obtained over Mr. Bouton? The latter personally received an official command to appear in the condemnation case before the mayor at a time named. The notice itself was valid and regular, in the prescribed statutory form, and duly served on Mr. Bouton within the territorial jurisdiction of the mayor. Mr. Bouton was entitled ¹⁰⁰ by law to six days' notice; but the mayor would have had jurisdiction over him if he had appeared without any notice, as he might have done.

So, also, might he have objected to the shortness of the service and have asserted his right to the full six days' notice by moving at the proper time to make that objection. But he did not see fit to do so. He was as competent to waive the full length of time of service as he was to appear without any notice whatever. The personal service of the process of the court brought the judicial power of the latter to bear upon him. He had his "day" to object to the process, if he did not deem it sufficient because not timely, or for any other reason; but he did not avail himself of that opportunity. He certainly could not, by ignoring the command of the writ, deprive the court of authority to determine as to the sufficiency of its service. It was for the court, not the party, to decide whether or not it was sufficient. It held it to be good, and rendered judgment accordingly. In contemplation of law, Mr. Bouton was before the court, for he had been personally summoned to appear there, and might have done so. If the call for his appearance was too sudden, the court's ruling that it was adequate may be error, which could have been rectified by seasonable and direct moves for that purpose, but such error could not defeat the court's jurisdiction to render a judgment conclusive upon him, or subject that judgment to successful attack collaterally.

A broad distinction is to be drawn between cases where no service on defendant appears and those in which service is

shown, but where it is in some respect deficient or irregular. In the latter cases, jurisdiction attaches, subject to be defeated by objections to the irregularity, interposed in season in some direct manner. ¹¹⁰ In the former class, jurisdiction is not obtained, if the law requires service.

Where the facts touching the acquisition of jurisdiction are fully disclosed, the principles of law governing liability to collateral attack are applied no less favorably to judgments of justices of the peace than to the adjudications of courts having more extensive powers.

We conclude, therefore, that, on principle, the shortness of the service on Mr. Bouton furnishes no substantial ground, in the present action, to deny effectiveness to the judgment in the condemnation case.

We have so far treated the question as an original one; but there are expressions of opinion upon it, in adjudged cases in this state, which should be noted.

In *Perryman v. State* (1843), 8 Mo. 208, the court was called on to decide upon the validity of a justice's judgment by default, where the return showed merely that the summons had been served "by acknowledgment." The judgment was held good, against collateral assault, the court observing: "If the defendant had no notice of the proceedings against him before the justice of the peace, the judgments were clearly void. But if notice was actually given, and the return of the constable established that fact, though the return might not be in conformity to the statute, the principle would not apply. The party might have set aside the return in the justice's court, or upon appeal, have reversed the judgment, but the judgment cannot be questioned in a collateral proceeding."

That decision was followed in *Jeffries v. Wright* (1873), 51 Mo. 215, in which an entry, in the justice's transcript, that the summons had been returned, "as served," was held to sufficiently establish jurisdiction acquired over defendant personally.

¹¹¹ A similar ruling had already been rendered on a justice's judgment in *Norton v. Quimby* (1870), 45 Mo. 391, where the language in regard to the service was, "returned executed as the law directs," and in *Wilson v. Jackson* (1847), 10 Mo. 329, the same conclusion was announced in respect of a judgment of a "superior court" in Virginia, based on a return of the summons "executed."

In *Crowley v. Wallace* (1848), 12 Mo. 143, the return of a

constable failed to show that the service of summons upon defendant (in a justice's court) was made in the proper township to confer jurisdiction; but the court held that, though the return might have been quashed for insufficiency, the judgment was not void in a collateral suit.

The same conclusion was reached, touching the purport of a like return upon the process of a county court in Virginia, questioned collaterally in this state: *State v. Williamson* (1874), 57 Mo. 198.

Sims v. Gray (1877), 66 Mo. 616, decided that a judgment of the probate court, prematurely entered, was not void, the court saying that "a judgment rendered after notice, but sooner than it should have been rendered, according to the rules of law or the practice of the court, is simply an irregular judgment."

The same view has been taken of judgments prematurely given by the circuit courts: *Branstetter v. Rives* (1864), 84 Mo. 318; *Bailey v. McGinniss* (1874), 57 Mo. 362.

In *Thompson v. Chicago etc. Ry. Co.* (1892), 110 Mo. 147, the second division unanimously ruled that where the law required that service of process, in a condemnation case, should include the delivery to defendant of a copy of the petition, the failure to deliver the copy rendered the service and judgment irregular, but not void when collaterally¹¹² assailed. To support that position Freeman on Judgments, section 126, was referred to in the divisional opinion. In the passage thus approved we find the following: "A service of process, defective in giving four days' notice when the law required five days' notice, is, nevertheless, sufficient to support the judgment of a justice of the peace."

But there are decisions in Missouri having a decided tendency to the contrary of those already noticed.

In *Sanders v. Rains* (1847), 10 Mo. 770, a justice's summons, returnable within a shorter period than that fixed by law, was held to invalidate totally the judgment which followed it. The decision itself appears to intimate a distinction between the effect of judgments resting on process void on its face for want of obedience to positive law, and that of judgments based on process, originally valid, but defectively or irregularly served, which latter point is the subject of our present consideration.

Moreover, the conclusion there announced is partly placed on the ground that "the same principle which authorized a

court to hold a writ of execution void, because it was made returnable in sixty instead of ninety days, must apply with much greater force to a summons." That very ruling in regard to executions was, indeed, shortly afterwards made by the same learned judge: *Stevens v. Chouteau* (1848), 11 Mo. 382, 49 Am. Dec. 92. But since then it has been totally discarded in *Norton v. Quimby* (1870), 45 Mo. 388.

The case of *Beech v. Abbott* (1834), 6 Vt. 586, cited in *Sanders v. Rains*, 10 Mo. 770, goes no further than to hold that in the absence of any notice a justice's judgment in an action of trover is void; a proposition undisputed; but in that same state it has been plainly ruled that "it was never supposed before that, because ¹¹³ the proper time was not given to a defendant to prepare for trial, the whole proceedings were rendered utterly void": *Hammond v. Wilder* (1853), 25 Vt. 346.

Another precedent on which *Sanders v. Rains* (1847), 10 Mo. 770, rests is *Grumon v. Raymond* (1814), 1 Conn. 40, 6 Am. Dec. 200, which can be best described shortly as holding precisely the contrary doctrine to that stated in the first point in the official *syllabus* to *Melcher v. Scruggs* (1880), 72 Mo. 406, since repeated in *State v. Devitt* (1891), 107 Mo. 576; 28 Am. St. Rep. 440.

It should be further borne in mind that the *Sanders* decision was pronounced by a divided court, Judges Napton and McBride uniting in it, Judge Scott dissenting. It does not deal with the facts now in judgment, where the summons, as issued, was entirely regular, and the service personal, but without the full interval, before the appearance day, which the law afforded to defendant. We have so fully discussed that case, and now mention another, *Williams v. Bower* (1858), 26 Mo. 601, merely because both are cited as the authoritative basis for the decision next mentioned.

In *Howard v. Clark* (1869), 43 Mo. 344, it was said that a judgment by default rendered upon service within the time the law prescribes is invalid"; and that such a judgment could be questioned collaterally. The last two preceding cases were cited, without discussion, as furnishing full authority for that ruling.

How far the *Sanders* decision supports the proposition the reader of what has been above written may judge.

The other case, *Williams v. Bower*, 26 Mo. 601, was not a collateral attack on a judgment. It was a direct attack

by appeal, to which very different principles apply, as is well known. Furthermore, the most important proposition asserted in the case last mentioned, ¹¹⁴ has been since mutely, but none the less positively, abandoned in *Gant v. Chicago etc. Ry. Co.* (1883), 79 Mo. 502, and *Witting v. St. Louis etc. Ry. Co.* (1891), 101 Mo. 631; 20 Am. St. Rep. 636; and other cases to the same point.

In *Frances v. Evans* (1886), 90 Mo. 74, the effect of a return of service within less than the required time before appearance was considered with reference to a garnishment proceeding upon execution, the return in question having been made in the original case. The court quoted a passage from the opinion in *Howard v. Clark*, 43 Mo. 844, holding that the subject was settled by the *Sanders* and *Williams* cases. Nothing was said of the other Missouri decisions already noted, ruling that where service appeared, jurisdiction of the person would be presumed in collateral proceedings, although conformity of that service to all the requirements of law was not affirmatively exhibited.

In this condition of the precedents in Missouri, we have felt at liberty to re-examine the subject and to declare the law as seemed in conformity with correct principles. In doing so we find that the position we have taken has ample support in well-considered cases in other states, bearing upon the precise point of present controversy: *Ballinger v. Tarbell* (1864), 16 Iowa, 491; 85 Am. Dec. 527; *McNeill v. Hallmark* (1866), 28 Tex. 157; *Glover v. Holman* (1871), 3 Heisk. 519; *Nelson v. Becker* (1875), 14 Kan. 509; *Betts v. Baxter* (1880), 58 Miss. 334; *Bowman v. Venice etc. Ry. Co.* (1882), 102 Ill. 472; *Jackson v. State* (1885), 104 Ind. 516.

2. It is next insisted that the judgment of condemnation is void because the record does not disclose that the mayor's jury (which assessed "benefits"), was composed of "disinterested freeholders of the city," as the charter required: *Sess. Acts*, 1875, p. 234, sec. 1. The record does not show the contrary, but it is silent on that point. The material question then is, ¹¹⁵ should the proceedings be presumed regular in this particular, or be presumed void for want of the showing mentioned.

The course of procedure prescribed by the charter of Kansas City to subject lands to public use for street purposes is judicial in its nature. It permits a trial by jury after due notice. The mayor is invested with "the power of a circuit

court for conducting such proceedings," enforcing process, passing on evidence, instructing the jury, etc.; and, after verdict before the mayor, an appeal may be taken by any one aggrieved to the circuit court, where the cause is triable anew.

In such a proceeding every party interested has a full opportunity to be heard, and to have his rights protected by the law, administered by its sworn officers. It differs essentially from some modes of procedure for exerting the power of eminent domain (shown in certain of the older precedents), in which the taking of title was effected summarily and *ex parte*, leaving the landowner to pursue his damages by slow marches through the courts later.

However, the proceeding now in question is special in its character, and it is statutory; but do those characteristics impair its force as a judicial function, or justify the application to it of different presumptions from those applied generally to ordinary legal proceedings?

Unfortunately on this question the decisions of Missouri are not in harmony.

It has been held in several cases (and remarked unnecessarily in others) that unless upon the face of the record every step requisite to the final exercise of jurisdiction in such cases as this affirmatively appear the judgment reached is to be regarded as wholly void even in a collateral action, and although the statutory ¹¹⁶ proceeding may have been had in a court of "superior" jurisdiction.

On the other hand, from an early date the supreme court, in another line of decisions, has applied to many special statutory proceedings, where the record was silent, the same presumption of correct action accorded to the doings of "superior" courts generally.

Thus in *State v. Weatherby* (1869), 45 Mo. 17, a statutory proceeding in the county court to incorporate a town was held not vulnerable to attack by *quo warranto*, where the petition on which the county court had acted failed to show the signatures of two-thirds of the taxable inhabitants of the proposed town, which the law required. The supreme court on that point ruled that the county court "had jurisdiction of the subject, and the propriety and regularity of its action is to be presumed until the contrary appears."

Substantially the same principle was declared in *State v. Evans* (1884), 83 Mo. 319, with reference to the action of a

county court in granting a dramshop license; and in *State v. Young* (1884), 84 Mo. 90, in regard to the action of school directors upon petitions for an election to change school districts.

In several cases (of which *Jones v. Driskill* (1887), 94 Mo. 190, may be mentioned as a type) it has been held that statutory actions to enforce the state's lien for taxes come within reach of the favorable presumptions allowed to ordinary judgments; and that rule now prevails in regard to special proceedings, in probate courts, for the sale of land of decedents to pay debts (*Johnson v. Beazley* (1877), 65 Mo. 250, 27 Am. Rep. 276), and to proceedings in those courts to enforce specific performance of contracts on bonds for title: *Williams v. Mitchell* (1892), 112 Mo. 300.

A number of similar rulings have been made at various times in the history of the court in proceedings ¹¹⁷ under the road laws, where mere silence of the record (as to certain steps required by statute to be taken) was held not to impair the validity of the judgments when challenged collaterally: *Wyatt v. Thomas* (1859), 29 Mo. 23; *Snoddy v. Pettis County* (1870), 45 Mo. 361; *Lingo v. Burford* (1892), 112 Mo. 149.

It has been very recently declared with reference to a street opening proceeding that an assessment of damages in a lump sum to several landowners, instead of a separate amount to each, would not render the judgment void when collaterally called in question, as in the case at bar: *Union Depot Co. v. Frederick* (1893), 117 Mo. 138.

All these cases present instances of the exercise of statutory jurisdiction entirely out of the course of common-law procedure. The deduction from them, and especially from those determined by the court in Bank within the past year, is that proceedings of a judicial nature, to acquire land for public use, when collaterally attacked, are to be viewed and construed with the benefit of the same presumptions of validity and regularity, ascribed by law to other proceedings before the same courts or officers: *Bowman v. Venice etc. Ry. Co.* (1882), 102 Ill. 472; *Tucker v. Sellers* (1891), 130 Ind. 514.

Where an interested party resists such proceedings in the first instance, by direct methods, the courts, undoubtedly, will insist on an observance of every substantial requirement of law before divestiture of private title; but in a collateral assault the rule is as above stated. Under that rule the fact that the record before us does not affirmatively recite the

qualifications of the mayor's jury is immaterial. It was directly so decided in *Porter v. Purdy* (1864), 29 N. Y. 106, 86 Am. Dec. 1283, a case which was followed as authority in *Lingo v. Burford* ¹¹⁸ (1892), 112 Mo. 149, and in *Union Depot Co. v. Frederick* (1893), 117 Mo. 138.

In the absence of any showing to the contrary it will be presumed that the mayor's action was correctly taken, and that he complied with the requirements of law in selecting the jury.

This result, we believe, accords with sound principle, as well as with the weight of authority: *Keyes v. Tait* (1865), 19 Iowa, 123; *Chicago etc. Ry. Co. v. Griesser* (1892), 48 Kan. 663; *American etc. Coal Co. v. Huntington etc. R. R. Co.* (1892), 130 Ind. 98.

It follows that the objections urged to the judgment in the condemnation case are untenable. The learned trial judge erred in ruling otherwise. Accordingly the cause is remanded to the Kansas City court of appeals, with directions to reverse the circuit court judgment, and to remand with an order for the entry of judgment for plaintiff in accord with this opinion.

BLACK, C. J., BRACE and MACFARLANE, JJ., concur.

JUDGMENTS BY DEFAULT—CONCLUSIVENESS OF.—A judgment by default regularly entered is as binding as any other as far as respects the power and jurisdiction of the court in declaring that the plaintiff is entitled to recover: *Green v. Hamilton*, 16 Md. 317; 77 Am. Dec. 295, and note. A judgment by default in an action in which the notice was not served the requisite number of days is erroneous, but is not subject to collateral attack: *Ballinger v. Tarbell*, 16 Iowa, 491, 85 Am. Dec. 527, and note. See the following cases where this question is discussed: *Briggs v. Richmond*, 10 Pick. 391; 20 Am. Dec. 526, and note; *Garrard v. Dollar*, 4 Jones, 175; 67 Am. Dec. 271; *Davenport v. Hubbard*, 46 Vt. 200; 14 Am. Rep. 620, and *Blair v. Bartlett*, 75 N. Y. 150; 31 Am. Rep. 455.

JUSTICE'S JUDGMENTS—COLLATERAL ATTACK.—When there is general jurisdiction of a subject though vested in an inferior tribunal, its judgment cannot be collaterally attacked: *Turner v. Conkey*, 132 Ind. 248; 32 Am. St. Rep. 251, and note. A judgment of a justice of the peace in a case in which he had jurisdiction is conclusive and not subject to collateral attack: *Mitchell v. Hawley*, 4 Denio, 414; 47 Am. Dec. 260, and note; *Heck v. Martin*, 75 Tex. 469; 16 Am. St. Rep. 915, and note; *Spaulding v. Chamberlain*, 12 Vt. 538; 36 Am. Dec. 358.

JUDGMENTS IN EMINENT DOMAIN PROCEEDINGS—CONCLUSIVENESS OF.—A judgment of a court having jurisdiction to award damages in eminent domain proceedings is conclusive upon the parties thereto as to all questions actually litigated as well as to all matters necessarily within the issue joined: *Atchison etc. R. R. Co. v. Boerner*, 34 Neb. 240; 33 Am. St. Rep. 637.

EVIDENCE—PRESUMPTION AS TO PUBLIC OFFICERS.—Public officers are always presumed to perform the duties required of them by law: *Owen*

v. *Baker*, 101 Mo. 407; 20 Am. St. Rep. 618, and note; *Washington v. Hoop*, 48 Kan. 324; 19 Am. St. Rep. 141, and note; *National Bank v. Herold*, 74 Cal. 603; 5 Am. St. Rep. 476; *Dubuc v. Voss*, 19 La. Ann. 210; 92 Am. Dec. 526, and note; *State v. Williams*, 99 Mo. 291; *State v. Wayne County Court*, 98 Mo. 362; *Bailey v. Winn*, 101 Mo. 649; *State v. Mastin*, 103 Mo. 508; *Rankin v. Colgan*, 92 Cal. 605; *St. Joseph v. Farrell*, 106 Mo. 437; *Finch v. Barclay*, 87 Ga. 393; *Pender v. Shumans*, 80 Ga. 505.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY v. SMITH.

[117 MISSOURI, 261.]

CORPORATIONS—CONVEYANCES TO, COLLATERAL ATTACK.—The capacity of a corporation to take a conveyance of land, after the transfer has reached completion, can be collaterally attacked by the state only, and not by a private party.

CORPORATIONS—CONVEYANCES TO—PRESUMPTION.—A proper and legitimate purpose is presumed on the part of a corporation in accepting a conveyance to land.

ASSIGNMENT OF RIGHT OF ACTION.—A right of action to recover an interest in land out of which the true owner has been defrauded is transferable.

FRAUDULENT CONVEYANCES.—NOTICE of fraud in a conveyance, by which a party is defrauded of his property, need not consist of positive information brought directly home to the party sought to be charged, but any thing which puts a prudent man on inquiry is notice in such case.

NOTICE MAY BE INFERRED FROM CIRCUMSTANCES and by reasonable inferences therefrom.

FRAUDULENT CONVEYANCES—INADEQUATE CONSIDERATION AS NOTICE.—A purchase of property for a one hundred and fiftieth part of its real value is in itself actual notice of fraud on the part of the grantor.

BONA FIDE PURCHASER—BURDEN OF PROOF.—One claiming to be a *bona fide* purchaser from a fraudulent grantor has the burden of proof to establish his claim.

FRAUD—PRESUMPTION—FAILURE TO APPEAR.—The failure of a party charged with fraud to appear and deny what is peculiarly within his own knowledge raises a presumption against him.

TRUSTS AND TRUSTEES—GAINS AND PROFITS TO WHOM BELONG.—All gains and profits arising from land, which come into the hands of a trustee, or fiduciary agent, by means of his position, belong to the owner of the land, and not to the trustee.

STATUTE OF LIMITATIONS—ENFORCEMENT OF TRUST.—A trust in real estate may be enforced at any time within ten years from its termination under the Missouri statute.

LIMITATION—FRAUD.—In cases of fraud the bar of the statute of limitations begins to run only from the date of the discovery of the fraud.

JUDGMENTS ON DEMURRER—RES JUDICATA.—Final judgment on demurrer to a petition which goes to the merits renders the whole matter *res judicata*.

CLOUD ON TITLE.—SUIT TO REMOVE a cloud from the title to land may be maintained by the owner of the equitable title, although the land is in the possession of another, when the object of such suit is to divest title and declare a trust.

PRACTICE—AMENDMENT OF PLEADING.—A petition or complaint may be amended to conform to the facts proved at any time before the entry of final judgment.

PRACTICE.—AN AMENDED ANSWER CANNOT BE FILED after the entry of final judgment.

FRAUDULENT CONVEYANCES—REIMBURSEMENT OF PURCHASE MONEY.—A fraudulent grantee, whose title to land is annulled by a court of equity, is not entitled to be reimbursed for purchase money paid by him of his own wrong and in furtherance of an actual fraud.

SUIT in equity by which plaintiff sought: 1. To establish as against defendant a trust in an undivided one-fifteenth of a tract of land in the city of St. Louis, known as United States Survey No. 2500; 2. To cancel certain deeds obtained by defendant of one Darby through fraud and breach of trust while acting as the agent of Mrs. Washington from whom plaintiff claims through mesne conveyances; 3. To declare defendant a trustee as to such deeds and certain lands and money acquired by him by means of said deeds, compromises, and exchanges made by him by reason thereof; 4. To divest defendant and invest plaintiff with the title to all such lands; and 5; To compel an accounting and other and further relief. The answer consisted of general denials coupled with allegations that plaintiff had no capacity to acquire the land mentioned in the petition, and that such acquisition was *ultra vires*; that defendant acquired the title of Darby for full value without notice of fraud or breach of trust on his part, and that the action was barred by the statute of limitations. The evidence adduced on the trial in the lower court was in substance as follows: Mary A. Washington, a resident of Georgia, was entitled to one-fifth of United States Survey 2500. In June, 1873, the whole of such survey worth \$2,500 per acre, was in the actual adverse possession of the heirs of Peter Lindell or their grantors, and had been partitioned among such heirs. In May, 1873, John F. Darby, an attorney, wrote to Mrs. Washington proposing to sue for and recover her share of said survey on terms of having for himself one-half of what he could recover, and on June 4, 1873, her reply letter reached him accepting his offer. On June 13 and 14, 1873, Darby wrote to Mrs. Washington two letters, and sent them inclosed with duplicate drafts of a contract of employment as attorney on the terms mentioned above, and also a draft of a quitclaim deed of

veying to him for one hundred dollars, and other good and valuable considerations paid, an undivided one-half of said survey and other lands. In his letter of the 13th Darby said: "This deed I will keep in my private papers till we shall have gained the suits, if we ever gain them." In his letter of the 14th he said: "The deed being quitclaim will, of course, be of no value or validity until I shall have gained the whole lands, and which I will have to sue for the whole in her name, and therefore carries nothing until the suits are gained, and I will of course keep the quitclaim now sent in my possession till after the recovery." As requested in these letters, and relying upon the statements made in them, Mrs. Washington executed the deed and contract, and returned them to Darby about June 20, 1873. There was no consideration for the deed except the agreement, and its only object was to secure him his fee in case he recovered the land. Darby failed to bring any suit, and after writing her many letters during 1873, at last informed her in December of that year that her claim was barred by limitation; that he did not wish to bring suit and for her to procure some one else to do so. Early in the following year she wrote to Darby to turn over the above-mentioned papers to one Yeatman. Darby replied that he would look them up and deliver them to her order, but failed to do so. In June, 1876, Mrs. Washington called on Darby, and asked him for these papers, when he replied that he did not consider them of any value and had destroyed the deed. He then sent her a package of papers the same day, together with a memorandum stating that he "had destroyed all deeds and agreements that had passed between them." Mrs. Washington, having accepted Darby's offer made in December, 1873, to give up the contract between them, in the early part of 1874 entered into new arrangements with the defendant and one Morrison to recover her interests in such survey. These arrangements were entered into as the result of investigation made by the defendant and the discovery of defects in the title held by the Lindell heirs which he thought made good the title of the Hammond heirs of which Mrs. Washington was one. Defendant then proposed to Morrison, an attorney, that the former should find the Hammond heirs and buy their interests or arrange with them for the assertion of their title, Morrison to furnish the necessary money, and the interests acquired to be held for their joint accounts, each to pay half the legal expenses and share equally in what was recovered.

This proposition accepted by Morrison resulted in Smith's acquiring from such heirs from forty-five to sixty per cent of the whole title to United States Survey 2500, which he took in his name for "joint account." He saw Mrs. Washington, and she refused to sell her interest, but agreed to convey, and did convey, him two-thirds of her interest under agreement that he was to prosecute suits for her for the remaining third free of costs to her, Morrison to assume liability for all such costs, and Smith to pay her seven thousand dollars out of his individual interest in what was recovered in addition to the part reserved by her. In April, 1874, the agreement between Smith and Morrison was changed to the effect that the latter was to retain three-fifths, and the former two-fifths, of what was recovered. Under this agreement the original contracts were canceled, the title reconveyed to the heirs, and new deeds from them to Morrison alone were executed, but taken to be as between him and Smith for their joint account in the proportions previously agreed upon. Mrs. Washington gave her deed to Morrison conveying him two-thirds of her interest; the original contract between her and Smith was canceled, and she then entered into an agreement with Morrison similar in all respects to the canceled agreement. Prior to this last arrangement, Smith had consulted with one Jewett, an attorney, and agreed to employ him in the proposed litigation, and after the change it was agreed by all parties that Jewett should be employed and paid out of the two-fifths interest to be deeded by Morrison to Smith. Before this was done, however, they agreed with Jewett that his fee was to be one-third of the two-fifths to be deeded to Smith free of all expense to Morrison. They then began sundry suits in ejectment with Mrs. Washington, all of the Hammond heirs and Morrison as plaintiffs, and sundry parties as defendants to recover the whole of United States Survey 2500. The signatures to the petitions in ejectment of those appearing as attorneys were D. T. Jewett and S. N. Holliday and James L. D. Morrison *pro se*. In their preparation and filing Smith, Jewett, and Morrison acted and consulted together, and a copy of such petition was sent by Morrison to Mrs. Washington June 18, 1874. On August 6, 1874, Morrison conveyed to Smith two-fifths of the interest acquired by him under the several deeds of the Hammond heirs, Mrs. Washington included, and on November 5, 1874, Smith deeded to Jewett one-third of his two-fifths. Morrison's deed to Smith was not recorded until March 10, 1884, and

that of Smith to Jewett until December 1, 1880. The deed from Morrison to Smith contained the following recitals: "1. The said two-fifths, if recovered in the actions of ejectment now pending for its recovery in the name of James L. D. Morrison, in the circuit court of St. Louis county, is chargeable for the payment to Mary A. Washington of the sum of seven thousand dollars, which said Smith covenanted to pay her, and said Morrison agreed to see paid and with two-fifths of any and all expenses, fees, and costs to be incurred in the prosecution of said suits in ejectment for the recovery of said land, except the fees to J. L. D. Morrison and D. T. Jewett, attorneys, the said Smith having arranged with said Jewett that his services are to be rendered free of all expense to said Morrison, as compensation for said Morrison's personal services." Smith's deed to Jewett was made subject to all the covenants, and the payment of one-third of all expenses as specified in the prior deed of Morrison to Smith. After these suits were brought in 1874 they were prosecuted by Morrison, Smith, and Jewett with varying success until 1881 or later. A number of them were tried and determined, and others were dismissed pursuant to compromises made. In all of these trials or other transactions all three of the men named were either personally present or took an active part, and all cases were disposed of with the consent of all three of them. Judgment was recovered for plaintiffs in three of the cases, executions were taken out and plaintiffs, including Mrs. Washington, put into possession of about nineteen acres in June, 1880, Jewett attending to suing out the executions and taking possession, and he and Smith were still in possession when this suit was brought. Prior to this time several of the cases were compromised as to certain parcels of land between the contending parties upon the basis of half in value to each. To carry out these compromises, the plaintiffs quitclaimed to the defendants or their grantees their interest in a certain parcel of land, and left them in possession, dismissing the suits as to them. These defendants, or their grantees, then quitclaimed to the plaintiffs their interest in another parcel of land and surrendered possession of such parcel. In each case the deeds made to plaintiffs were for fractional interests of the same amount as they respectively claimed under the Hammond title. During the progress of the litigation from 1874 to 1880 much correspondence by letter passed between Smith, Morrison, and Mrs. Washington, and these letters all

showed that Smith and Morrison were the trusted agents of Mrs. Washington to bring the litigation to a successful termination. In December, 1879, Jewett, as attorney for one of the Hammond heirs, Mrs. Webb, had brought suit for partition of all lands before gained by compromises. Mrs. Washington, Morrison, and others were made parties defendant. Smith drafted an interlocutory decree, which was entered October 13, 1880, and on October 26th, before final decree was entered, he moved by his attorney to set aside the interlocutory decree on the ground that a conveyance had been put on record which would vary the portion of land to be partitioned to him and others. This motion was granted and the suit dismissed December 15, 1880. A few days before filing this motion Smith met Darby, who told him that he, Darby, had a deed to Mrs. Washington's interest in United States Survey 2500. Smith asked that such deed be given to him, but Darby refused, and finally agreed to transfer his interest in said survey in consideration of one hundred dollars. He thereupon, on October 25, 1880, quitclaimed his interest to Smith, delivered to him his quitclaim deed, and assigned to him the deed and contract which Mrs. Washington had executed to him in 1874, and of the existence of which Smith had knowledge through Mrs. Washington in the latter year. Smith put the Darby deed to him on record on October 27, 1880, without consulting with Mrs. Washington or Jewett, and neither of them knew of its existence until long after it was recorded. From this time Smith asserted title to the entire one-fifteenth interest in the land, formerly recognized by him as Mrs. Washington's. He asserted title to such interest, including that portion already gained by compromises as well as that uncompromised and yet in litigation, by suit against her begun February 11, 1881, to have title divested out of her and vested in him. This suit, as well as other similar litigation instituted by him, was unsuccessful. In February, 1881, Mrs. Washington conveyed her entire interest in the land to one Fisher, who in March, 1881, conveyed the land to one Wade, who subsequently conveyed it to the plaintiff. The findings and judgment of the court below were to the effect that Smith, "when he took Darby's deed of October 25, 1880, held a relation of trust and confidence to Mrs. Washington as to her interest in United States Survey 2500, and the actions of ejectment then being prosecuted for her by Morrison and defendant as an associate and assistant of him as set out in the

petition, and that by reason of his so holding the same, whatever title in the particular eleven parcels firstly described in the petition was acquired by him by virtue of said deed was taken by him in trust for her, and thereafter was held by him as a trustee for her and the respective successive assignees of her rights in the same, namely, Fisher, Wade, and plaintiff, under the several deeds of 1881 and 1883 mentioned, and on the repayment to him by plaintiff of the one hundred dollars he had paid Darby, with interest, all the title so acquired by him ought to be divested out of him, and vested in plaintiff; that plaintiff by virtue of the deeds mentioned in the petition made to Mrs. Washington by divers of the defendants in said actions of ejectment pursuant to compromises of the eight parcels first particularly described therein, and of the deeds therein mentioned made to Fisher, pursuant to compromise of others of said actions, of the three other parcels described therein, and by virtue of the deeds of February 5, 1881, April 11, 1881, and July 28, 1883, and of the interlocutory and final decrees in the suit in partition begun on April 14, 1881, by *Mary Jewett v. Hammond*, cause number 56054, mentioned in the petition, acquired the title to an undivided one-fifteenth of said eleven parcels, and the whole of the two parcels of lot 49 of Peter Lindell's second addition set apart by the commissioners in partition in said cause 56054 as in controversy between the defendant and Robert B. Wade; and all the rights in law or equity of Mrs. Washington, Fisher, and Wade therein; that the claim of title of defendant to a one-fifteenth of said eleven parcels, and to the whole of said two parcels of said lot 49, so set apart as in controversy under said deeds to and by Darby, was a cloud upon plaintiff's title to said two parcels of lot 49, and said undivided one-fifteenth of said eleven parcels, and that plaintiff was entitled to relief as prayed in its petition in respect of its title to said one-fifteenth of said eleven parcels, and the whole of said two parcels so set apart, and accordingly then decreed that defendant at the time of the commencement of said suit of *Jewett v. Hammond*, on April 14, 1881, and the making of the interlocutory decree therein, on October 20, 1881, held whatever title was acquired by him by virtue of said deeds of June 20, 1873, of Mary A. Washington to John F. Darby, and of October 25, 1880, of Darby to him, defendant, in or to said undivided one-fifteenth of said eleven parcels of said survey (describing them as in the petition) in trust for Robert B. Wade, and that since July 28, 1883, had

held whatever title he by virtue of said two deeds of June 20 1873, and October 25, 1880, acquired in said undivided one-fifteenth, or that he now has by virtue thereof, or of the interlocutory and final decrees in said cause in partition, of *Mary Jewett v. Hammond and others*, in said two parcels of said lot number 49, by said commissioners set apart to him or said Wade, in trust for plaintiff; and that in case plaintiff by April 13, 1891, paid into the hands of the clerk for defendant's use one hundred dollars, with interest from October 25, 1880, in all one hundred and sixty-four dollars, he, defendant, should, by April 20, 1891, deliver to the clerk for plaintiff's use his deed releasing to plaintiff all the title and interest that he acquired by virtue of said two deeds in said eleven parcels, or that he then held by virtue of them or said decrees in said cause 56054 in said two parcels of lot number 49 so set apart by said commissioners, and that in case of his failure so to deliver such deed by said last-named day, then all the title acquired or held by him should be divested out of him and vested in plaintiff, and he should be forever enjoined from setting up or claiming any title in said one-fifteenth in said eleven parcels, or any part of said two parcels so set apart under said two deeds of 1873 and 1880, and that the further disposition of the cause should be adjourned till April 30, 1891. And on April 30, 1891, a final decree was entered, in which, it being shown to the court that plaintiff had, before April 13, 1891, paid one hundred and sixty-four dollars into the clerk's hands for defendant's use, and that defendant had not delivered to him any deed for plaintiff, it was then decreed that all the judgments and directions of the decree of April 7, 1891, should be confirmed, and made firm and effectual forever, and that all the title that defendant, by virtue of the two deeds of June 20, 1873, and October 25, 1880, acquired in said one-fifteenth of said eleven parcels, or then by virtue of said deeds, or the decrees made in said cause 56054, held in said two parcels of lot 49 set apart to him or Robert B. Wade as in controversy, etc., should be divested out of him and be vested in plaintiff, and that he be forever enjoined from setting up such title, etc., and that plaintiff recover of him its costs of suit, etc. At the time of entering the decree, leave was given plaintiff to amend its petition to conform to the facts proven. Defendant excepted to this permission to amend, and three days thereafter moved for leave to amend his answer, which was denied. From this decree,

after necessary motions, both parties appealed—the plaintiff because a trust was not declared as to other tracts of land, etc., described in the petition; the defendant because any trust whatever in the land was declared in plaintiff's favor."

John W. Dryden and Joseph Dobyns, for the plaintiff appellant.

Henry H. Denison and Alexander Martin, for the defendant appellant.

289 SHERWOOD, J. Upon the evidence adduced in support of the issues made by the pleadings, various questions arise requiring consideration.

1. The settled law of this state, as illustrated by frequent instances in this court, is, that the capacity of a corporation to take a conveyance of land cannot, after the transfer has reached completion, be called in question in a collateral way, but by the state, and not by a private suitor. This doctrine applies to all classes of actions and in every variety of cases: *Chambers v. City of St. Louis*, 29 Mo. 573; *Land v. Coffman*, 50 Mo. 243; 290 *Atlantic etc. R. R. Co. v. City of St. Louis*, 66 Mo. 251; *Thorton v. National Exch. Bank*, 71 Mo. 221; *Shewalter v. Pirner*, 55 Mo. 219; *Ragan v. McElroy*, 98 Mo. 352, and other cases.

The only exception to the rule which prohibits collateral attack by private persons on such conveyances or other unauthorized acts of a corporation, is where such attack is authorized by express legislative permission: *Martindale v. Kansas etc. R. R. Co.*, 60 Mo. 508; *Kinealy v. St. Louis etc. Ry. Co.*, 69 Mo. 663; *Hovelman v. Kansas etc. R. R. Co.*, 79 Mo. 633. This is the rule also announced by the supreme court of the United States: *National Bank v. Matthews*, 98 U. S. 621, which overruled on this point, *Matthews v. Skinker*, 62 Mo. 329, 21 Am. Rep. 425.

As shown by the brief of plaintiff's counsel, this rule still prevails in that court and in many of the states. This rule, however, is entirely consistent with another rule announced by the same court in *Case v. Kelly*, 133 U. S. 28, regarding the refusal of a court to interfere in behalf of a corporation whose rights rest only in executory contract, which it seeks outside of the provisions of its charter to have enforced. This distinction is also taken in *Land v. Coffman*, 50 Mo. 243. But it seems that there was no evidence that the purchase by the plaintiff from Wade (who bought from Fisher, who bought

from Mrs. Washington, the original owner) was for an unauthorized purpose. Absent any evidence to the contrary, a proper and legitimate purpose will be presumed: *Chautauqua County Bank v. Risley*, 19 N. Y. 369; 75 Am. Dec. 847.

2. Having determined that the capacity of the plaintiff corporation to take whatever title Wade possessed could not collaterally be attacked, the next point for examination is whether Mrs. Washington's title to the property in controversy was such an one as possessed the elements and attributes of transferability.

²⁹¹ If indeed Mrs. Washington was the possessor of an interest in the land in controversy, and she was defrauded out of it, there can be no question under our statutory provisions and frequent rulings on the point, but that she could maintain any suitable action or proceeding to regain whatever rights she had lost by reason of any fraud practiced against her; and any such right, whether legal or equitable, whether sounding in contract or sounding in tort, which survived the person are transferable: 1 Rev. Stats., 1879, secs. 2354, 3462. Thus, in *Street v. Goss*, 62 Mo. 226, it was ruled that the equitable right of a debtor to have a conveyance obtained by an agent of his principal through fraud was vendible under execution.

In an early case it was held that under the new code a right of action for the conversion of property was assignable, and that the assignor could sue in his own name: *Smith v. Kennett*, 18 Mo. 154. See, also, *Melton v. Smith*, 65 Mo. 315, and cases cited. In the cases of *Snyder v. Wabash etc. Ry. Co.*, 86 Mo. 613, and *Doering v. Kenamore*, 86 Mo. 588, it was decided that under the code a right of action arising from a tort to property was assignable. Some observations which fell from Judge Bliss in *Smith v. Harris*, 43 Mo. 557, were based on the case of *McMahon v. Allen*, 34 Barb. 56, subsequently overruled on appeal in 35 N. Y. 403, after an elaborate review of the authorities both in England and this country, in which case it was held that a conveyance obtained by fraud and in violation of a fiduciary relation might be the subject of a grant or assignment which would enable the grantee or assignee to file a bill to set aside the previous conveyance.

On the same footing in equity and governed by the same rules are those cases where a right to establish a trust in lands, either actual or constructive, has been transferred: 2 Story on Equity Jurisprudence, ²⁹² 13th ed., sec. 1050;

Stump v. Gaby, 2 De Gex, M. & G. 623; *Gresley v. Mousley*, 4 De Gex & J. 78.

8. Having ascertained that the plaintiff corporation had the capacity to take the conveyance upon which this proceeding is grounded, a capacity which cannot at least be questioned collaterally, and that Mrs. Washington, if defrauded, had a tangible interest in the litigated property, capable of recognition in a court of equity, and capable of being transferred by mesne conveyance from Mrs. Washington to Fisher, and from the latter to Wade and from him to the plaintiff, it is next in order to determine whether Mrs. Washington was defrauded as charged in the petition. Intimately connected with this question is one respecting notices to the alleged defrauder.

Did defendant have notice? This question will be considered and answered from various points of view. Notice in this connection does not mean positive information brought directly home to the party sought to be charged. Any thing which will put a prudent man upon inquiry is notice. And gross negligence in failing to make inquiry when the surrounding facts suggest the existence of others, and that inquiry to be made is tantamount in courts of equity to notice: *Major v. Bukley*, 51 Mo. 227; *Leavitt v. La Force*, 71 Mo. 353; *Roan v. Winn*, 93 Mo. 503. This is the universally prevalent doctrine of courts of equity in all jurisdictions: 2 Pomeroy's Equity Jurisprudence, 2d ed., secs. 596, 597, 598, 599, 600 et seq. And actual notice may be inferred from circumstances and by reasonable deductions therefrom: *Brown v. Volkening*, 64 N. Y. 76. Courts of equity, since their earliest foundation, have always recognized that the still, small voice of suggestion, emanating as it will from contiguous facts and surrounding circumstances, pregnant with inference and provocative of inquiry, is ²⁹⁸ as potent to impart notice as a presidential proclamation or an army with banners.

In this case, however, there is no occasion to invoke inferences from surrounding circumstances or draw deductions from conceded facts, because here the testimony is uncontradicted that: 1. Mrs. Washington told defendant, in 1874, at the time he opened negotiations with her respecting the land, of Darby's contract, its nonperformance, and its rescission. And in his testimony taken in another cause defendant admitted the same thing. Defendant was also notified by seeing and taking from Darby, in October, 1880, an assignment

of the very contract itself, whereby Darby had undertaken to recover Mrs. Washington's interest for her; a contract then over seven years old, and wholly unperformed. Not content with that, defendant even took an assignment of the deed to Darby, and of Darby's interest therein, paying him therefor one hundred dollars, a beggarly pittance for property then worth some fifteen thousand dollars. 2. The purchase from Darby, by defendant, of such valuable property at such a paltry figure is evidence of notice in and of itself, and shows, when coupled with the other pregnant circumstances mentioned, that the transaction was merely colorable, and not a *bona fide* purchase: *Eck v. Hatcher*, 58 Mo. 235; *Lionberger v. Baker*, 88 Mo. 454; *Hoppin v. Doty*, 25 Wis. 573; 2 Pomeroy's Equity Jurisprudence, 2d ed., sec. 600. 3. But in this case defendant pleaded as an affirmative defense that he "acquired the title of Darby for full value, and without notice of the supposed fraud and breach of trust of Darby." This plea, it will be observed, lacks the averment that the purchase was made in good faith. This is a serious defect: 2 Pomeroy's Equity Jurisprudence, 2d ed., sec. 762. But, waiving such defect, treating the plea as sufficient in fullness and specific averments, still the ²⁹⁴ *onus* of proving himself a *bona fide* purchaser rested on defendant: *Jewett v. Palmer*, 7 Johns. Ch. 65; 11 Am. Dec. 401. 4. That the burden rests on the shoulders of him who pleads it is especially true where the vendor of the title in question was guilty of a fraud, in which case the same rule applies to the purchaser under such fraudulent grantor as applies to the purchaser of negotiable paper which had its origin in fraud: *Sillyman v. King*, 36 Iowa, 208, and cases cited. That Darby was guilty of fraud in the transaction is too plain for argument; and that defendant was equally culpable does not admit of question. 5. Moreover, charged as was defendant with fraud, his failure to appear and testify in denial of the charge of something peculiarly within his own knowledge carries with it the usual unfavorable and damaging presumptions: *Henderson v. Henderson*, 55 Mo. 534; *Cass County v. Green*, 66 Mo. 498; *Goldsby v. Johnson*, 82 Mo. 602; *Leeper v. Bates*, 85 Mo. 224. On this branch of the case, then, we hold that defendant had ample and actual notice, and with such notice he deliberately, so far as in him lay, defrauded Mrs. Washington.

4. Not only was defendant blameworthy in the manner already noted, but he was also in other particulars. That he

occupied toward Mrs. Washington and her interests a fiduciary relation cannot, considering the evidence, admit of doubt. That this was true upon the making of the first contract which he made with her in February, 1874, is quite apparent. The contract subsequently made by Mrs. Washington with Morrison was but substitutionary of the first one made by her with defendant. This is obvious for many reasons. His interest in the litigated land still continued to be bound by a lien in Mrs. Washington's favor, in addition to the part reserved to her, which was one-fifteenth, the other two-fifteenths having been conveyed to Morrison ²⁹⁵ on the "joint account" of defendant and himself. After this defendant took depositions; attended trials; prepared bills of exceptions; effected compromises; drew deeds therefor, in which Mrs. Washington was awarded one-fifteenth, and he received from her deed of compromise in return, and recorded the same; and he drew petitions, carried on correspondence with Mrs. Washington, informing her from time to time of what was being done; receiving letters from her showing the reliance she placed in him. In short, defendant, in all except the bare name, was the attorney of Mrs. Washington, and certainly was her trusted agent. Whether he did so gratuitously or not does not alter his position towards her or affect its fiduciary character. And the *status* of defendant towards Mrs. Washington is not changed because she wrote similar letters to Morrison.

This being the case, all the gains of defendant by means of his position, whether through the Darby deed or otherwise, belonged to Mrs. Washington, of which gains he could in no wise deprive her: *Jamison v. Glascock*, 29 Mo. 191; *Bent v. Priest*, 86 Mo. 475, and cases cited.

The doctrine which dominates a trustee in this regard applies not only to trustees of technical or express trusts, but to all occupying a similar relation, whether cotenants, agent for hire, gratuitous agents, subagents, partners, and employees of agents, and even to officious intermeddlers in the business of others, or who, by being employed in the affairs of another, have acquired a knowledge of his property: 2 Sugden on Vendors, 8th Am. ed., pp. 408 et seq., and notes; *Baker v. Whiting*, 1 Story, 218; Bispham's Principles of Equity, 4th ed., sec. 93; *Keech v. Sandford*, 1 White and Tudor's Leading Cases, 4th Am. ed., 62; *Allen v. De Groodt*, 98 Mo. 159; 14 Am. St. Rep. 626.

²⁹⁶ Because of the foregoing considerations it necessarily

results that Mrs. Washington was entitled to her full one-fifteenth in all of the lands in United States survey 2500, and the like amount of all moneys derived from compromises or exchange, and the plaintiff, as the assignee of her rights, should have prevailed in securing that *quantum* of interest. This is true, unless the statute of limitations has created a bar, which point is next for consideration.

5. As to that point, it is sufficient to say that, as this suit concerns real estate, ten years is necessary to constitute a bar; and the same length of time is requisite where it is sought to enforce trusts in real estate: *Buren v. Buren*, 79 Mo. 538, and cases cited. Now, in this case, from the time of defendant's dealing with Darby to the time when this proceeding was instituted was only about five and one-third years. Until that occurrence there was no adverse holding or adverse claim on Darby's part. Besides, as a fraud was practiced when the Darby deed was delivered, ten years would be allowed the injured party from that time in which to discover that fraud and to bring his action: 2 Rev. Stats., 1889, sec. 6775, subd. 5. Furthermore, the question of defendant's right to the land in question was being litigated: *Smith v. Washington*, 11 Mo. App. 520; 88 Mo. 476.

6. In addition to what heretofore has been said respecting the Darby deed and the defendant's claim thereunder, it may be remarked that, even if defendant had acquired any valid right under that deed, it would have been swept away, as the result of the litigation in case 55597, reported as above; for in that case the right of defendant to claim against Mrs. Washington the interest derived under the Darby deed was distinctly adjudged against him, judgment going in her favor. This adjudication occurred in 1882, and though ²⁹⁷ made on a demurrer to the petition, yet, as the demurrer went to the merits, the whole matter in controversy became *res judicata*: Bigelow on Estoppel, 5th ed., 56. And it was as competent to offer the judgment in evidence as it was to plead it, and the effect was the same: *Garton v. Botts*, 73 Mo. 274, and cases cited.

Defendant's testimony taken in other causes abundantly shows that he relied on the Darby deed, but before that conceded that Mrs. Washington was entitled to one-fifteenth, for, amongst other things, he says: "There never was any dispute about Mrs. Washington's title to one-fifteenth of that land until I discovered the Darby deed."

7. Something has been said about plaintiff's inability to obtain equitable relief by removing a cloud from its title because defendant Smith was in possession. There would be weight in this suggestion if plaintiff had the legal title, but as it has not, resort to a court of equity was a necessity, both for that purpose and in order to divest title and declare a trust: *Mason v. Black*, 87 Mo. 329, and cases cited.

8. It was proper for the court to permit plaintiff, before the entry of the final decree, to amend its petition to conform to the facts proven; and there was no error three days after the entry of the final decree to refuse defendant permission to file an amended answer; nor does it appear in what the proposed amendment consisted, whether or not it was material: *Howell v. Stewart*, 54 Mo. 407, 408.

9. As before indicated, the decree entered, while correct so far as it went, did not go far enough, because it did not accord to plaintiff as extensive relief as that to which it was entitled; but the decree went too far when it required plaintiff to repay to defendant the one hundred dollars with interest which he had paid Darby. This money having been paid by defendant of his own ³⁹⁸ wrong, and in furtherance of an actual fraud, a court of equity will not aid him to recover it, but will leave him where it finds him: *Gilbert v. Hoffman*, 2 Watts, 66; 26 Am. Dec. 103; *Jackson v. Summerville*, 13 Pa. St. 359; *Sands v. Codwise*, 4 Johns. 597; 4 Am. Dec. 305; *McCaskey v. Graff*, 23 Pa. St. 321; 62 Am. Dec. 336.

For the foregoing reasons we reverse the decree, and remand the cause, with directions that the lower court, in conformity to this opinion, do enter a decree in favor of plaintiff, treating defendant as a trustee in all respects, and compelling him to account for all gains made in that capacity to the extent of Mrs. Washington's equitable interest in the property, whether in land or money.

All concur.

CORPORATION'S POWER TO TAKE AND HOLD REALTY can be questioned by the state only: *Hough v. Cook County Land Co.*, 73 Ill. 23; 24 Am. Rep. 230; extended note to *Page v. Heineberg*, 94 Am. Dec. 382.

FRAUDULENT CONVEYANCES—EFFECT OF KNOWLEDGE OF VENDEE—WHAT IS NOTICE.—A sale though made by a vendor with fraudulent intent will not be declared void unless the vendee had actual notice of such intent. Knowledge of facts which, if investigated, would lead to knowledge of the fraud, is not sufficient to invalidate the transaction: *State v. Mason*, 112 Mo. 374; 34 Am. St. Rep. 390, and extended note, where the questions as to what

circumstances raise a presumption of fraud, and a knowledge of what facts are sufficient to put a vendee on inquiry are discussed.

FRAUDULENT CONVEYANCES.—BURDEN OF PROOF AS TO BONA FIDE PURCHASER: See extended notes to *State v. Mason*, 34 Am. St. Rep. 402; and *Brown v. Mitchell*, 11 Am. St. Rep. 758.

TRUSTS.—GAINS AND PROFITS arising from property impressed with a constructive trust inure to the benefit of the real owner, and should be impressed with a like trust in his favor: *Farmers' etc. Bank v. Kimball Milling Co.*, 1 S. D. 388; 36 Am. St. Rep. 739.

LIMITATIONS OF ACTIONS IN CASES INVOLVING FRAUD.—The statute begins to run from the discovery of the fraud, or from the time when it ought to have been discovered by the exercise of proper diligence and inquiry: *Chicago etc. Ry. Co. v. Titterington*, 84 Tex. 218; 31 Am. St. Rep. 39, and note, with the cases collected. See a full discussion of the question in the extended note to *Snodgrass v. Branch Bank*, 60 Am. Dec. 511-515, and *Woods v. Williams*, 142 Ill. 269; 34 Am. St. Rep. 79, and note; and *State v. Standard Oil Co.*, 49 Ohio St. 137; 34 Am. St. Rep. 541, and note.

PLEADINGS.—AMENDMENT AFTER JUDGMENT: See note to *Bunneman v. Wagner*, 8 Am. St. Rep. 311. Under the code system of pleading courts have power to allow amendments both before and after judgment, the only limitation being that no vested right shall be disturbed, and that the cause of action or defense shall not be substantially changed: *Brown v. Mitchell*, 102 N. C. 347; 11 Am. St. Rep. 748. No amendment of pleadings is allowed after the rendition of judgment: *Landry v. Baugnon*, 17 La. 82; 36 Am. Dec. 606; see the extended note to *Stevenson v. Mudgett*, 34 Am. Dec. 158.

JUDGMENTS ON DEMURRER are conclusive upon the questions legitimately involved: *Ellis v. Northern Pac. R. R. Co.*, 80 Wis. 459; 27 Am. St. Rep. 44, and note, where plaintiff has declined to amend: *Scherff v. Missouri Pac. Ry. Co.*, 81 Tex. 471; 26 Am. St. Rep. 828, and note.

WHITE v. POLLOCK.

[117 MISSOURI, 467.]

DEEDS—DELIVERY.—A deed delivered by the grantor to a third person to be delivered to the grantee, and by such third person delivered to the grantee, constitutes a good delivery, though the grantor was dead at the date of the last delivery. The delivery becomes operative by relation as of the date when first made to such third person, if an intent to that effect is manifested by acts or words, or by both.

DEEDS—DELIVERY.—A deed from a father to his son, delivered by the father to his wife, and accepted by her in the presence of the son, and with his consent, accompanied by words showing a present intent to deliver, constitutes a good delivery, although the deed is not delivered by the wife to the son until after the grantor's death.

Phillips and Walker, for the appellants.

Wilson Cramer, for the respondent.

409 MACFARLANE, J. This suit is ejectment. Plaintiffs claim title as heirs of Jonathan Pollock, deceased, and de-

defendant claims under a deed from the said Pollock in his lifetime, conveying to him the land in dispute. Plaintiffs are the children and grandchildren of Jonathan Pollock by a first marriage, and defendant is an only child from a second marriage. On the 14th of May, 1884, said deceased executed and acknowledged a deed in due form, which purported to convey to defendant the land in suit. The question hinges on the delivery of the deed. The evidence shows that at the date of the deed defendant was twenty-one or twenty-two years of age, and lived with his parents on a portion of this land, which at that time was worth about seven thousand five hundred dollars.

Defendant's father at that time was near eighty years of age, though, so far as appeared, was in good physical and mental condition. He also owned personal property valued at something over two thousand dollars. His children had all left him except defendant. The evidence, detailed by a number of witnesses, and which was undisputed, was to the effect that in conversations prior to the date of the deed Jonathan Pollock had stated that he intended this land for his son Dannie, as he called defendant; that Dannie was to take care of him while he lived, and he would give him the land. The deed was written by, and the acknowledgment taken before, a notary, J. Q. A. Gardner, who, except defendant and his parents, was the only person present when the transaction took place. He testified: "I went to his house to prepare a deed, this deed, and he told me why he wanted to make a deed; said he was getting old; probably he might live to an old age, and be helpless, and he wanted somebody he could rely upon to see to him if he should become ⁴⁷⁰ so he needed assistance, and that Dannie (he referred to defendant L. D. C. Pollock) was the only one left of his children that was likely to stay with him, and that he wanted to deed him his real estate, so that there would be nothing hereafter about it; wanted to get it all so arranged that there would be no trouble hereafter; I then prepared the deed, and while I was preparing he was talking about his business; he said he had assisted his older children, and he thought it would be nothing but right for Dannie to have the land, for he knew, however long he lived, Dannie would take care of him; that his other children would have about equal share with him in all probability; said he had considerable amount of other prop-

erty, and that they would all share in that equally; the other property referred to was personal property.

"Q. Do you remember he called his wife in, and said: 'Here is Dannie's deed; take care of it?'

"A. She was in the room, and he told her he wanted her to take care of that deed for Dannie; . . . they were having a conversation about dower; he told her to take care of Dannie's deed for him; Dannie also remarked that he wanted his mother to take care of it for him; . . . question came up about her signing the deed and her dower; she said she did n't want to sign her dower away, for Dannie might die before she did, and she would be cut out of her home; that Dannie would take care of her as long as she lived; that it was not necessary to sign her dower away; and she did n't; . . . they asked me about recording—the old man and his wife both—if it would be necessary to have the deed recorded right away; I told them I did n't think it would be necessary."

On cross-examination he was asked: "When you finished the deed, and handed it to him, what did he say?"

"A. He called to his wife, and said: 'Here is ⁴⁷¹ Dannie's deed. I want you to take it, and take care of it for him.'"

After the date of the deed, defendant took control of the land, living on it with his parents, working part and renting part. The deed was kept in an old satchel in which other papers belonging to the said Jonathan Pollock were kept, but they were all in the custody of his wife, he being unable to read.

Jonathan Pollock died in April, 1888, and his wife in three or four days thereafter. Nothing in his conduct from the date of the deed to his death was inconsistent with the due delivery of the deed. The evidence tended to prove that, a day or two previous to the death of Mrs. Pollock, she told the wife of defendant to get the deed out of the satchel and give it to him. At any rate, the deed was taken from the satchel a few days after the death of Jonathan Pollock, and was filed for record by defendant.

Some evidence was offered by plaintiffs to impeach that given by Gardner. An insurance policy on the house, made subsequent to the deed and existing at the death of Jonathan Pollock, was in his name. After the date of the deed a tract of the land was sold for three hundred and fifty dollars, of which one hundred dollars cash was paid to the father and a

note for the remainder was made payable to defendant. The title bond was signed by both, because, as was said, there was no deed on record. Evidence was also offered by plaintiff, which tended to prove that at one time (date not known) Jonathan Pollock had threatened to disinherit one of his heirs, if a certain course of conduct was pursued, and that some of the heirs had received no advancements. This evidence was excluded by the court.

The court sat as a jury, and gave the following declaration of law: "If it shall appear and be found from the evidence in this cause that Jonathan Pollock, ⁴⁷² after signing and acknowledging the deed from himself to the defendant, called to his wife and said to her, 'Here is Dannie's deed; I want you to take it and take care of it for him,' and that, in compliance with such request, the wife of Pollock took charge and control of said deed at the time, then there was a delivery, and the title of Jonathan Pollock passed, by virtue of such deed, to the defendant."

This instruction sufficiently points out the theory by which the court was governed. The finding and judgment of the court was for the defendant, and plaintiffs appealed.

The law in a case, the facts of which are analogous to this one in most of its features, was thus expressed by Black, J., in the recent case of *Sneathen v. Sneathen*, 104 Mo. 209, 24 Am. St. Rep. 326: "Delivery of a deed is, of course, an essential element of a valid transfer of title to real estate, and it must take place during the life of the grantor; for a deed cannot be made to perform the functions of a will. But the delivery need not be to the grantee in person. A deed delivered by the grantor to a third person to be delivered to the grantee, and by such third person delivered to the grantee, will constitute a good delivery, though the grantor is dead at the date of the last delivery; for the delivery takes effect by relation as of the date when first made to the third person. In such cases it should appear that the grantor parted with all dominion and control over the instrument, intending it to take effect and pass title as a present transfer. This intention may be manifested by acts, or by words, or by both words and acts": Citing *Burke v. Adams*, 80 Mo. 506; 50 Am. Rep. 510; *Standiford v. Standiford*, 97 Mo. 231; Tiedeman on Real Property, sec. 814.

It is also said in the same case: "It is true that Mrs. Sneathen placed the deed in a trunk with the ⁴⁷² grantor's

other papers, where he could repossess himself of them if he desired to do so. But the rule that the grantor must part with all dominion and control over the deed does not mean that he must put it out of his physical power to procure possession of it. It is sufficient that the deed is delivered to the third person for the grantee without reservation, and with the intention that it shall take effect, and from that time operate as a transfer of the title."

It is said further: "No suggestion is made, nor do we see any reason why the wife of the grantor may not be the third person, within the rules before stated, to whom the deed is delivered for the grantees."

These excerpts express the law which governs this case, and are supported by numerous other late decisions of this court: *Scott v. Scott*, 95 Mo. 300; *Standiford v. Standiford*, 97 Mo. 239; *Crowder v. Searcy*, 103 Mo. 117; *Tyler v. Hall*, 106 Mo. 313; 27 Am. St. Rep. 337; *Hall v. Hall*, 107 Mo. 101; *Allen v. De Groodt*, 105 Mo. 449.

There is no question in this case in respect to the acceptance of the deed by defendant. He was present when it was executed, and he then expressed a willingness to accept it; he also, after the death of the grantor, received and filed it for record.

It will be seen from the declaration of law given that the court omitted to require, as essential to the validity of the conveyance, that the "grantor parted with all dominion and control over the instrument, intending it to take effect, and pass the title as a present transfer." Doubtless the court construed the language of the grantor to his wife, "Here is Dannie's deed, I want you to take it and take care of it for him," if found to have been used, as being conclusive of an intention to part with his dominion and control over it, and to pass the title to the land as a present transfer. The court necessarily found that this language ⁴⁷⁴ was used, and an examination of the evidence of what was said and done on this occasion discloses nothing which qualifies this language or was inconsistent with it. The use of this language and the acceptance of the deed by the wife, in the presence of the grantee and with his consent, constituted all the evidence bearing upon the question of the delivery; and its legal effect was a question of law for the court, none of these facts being controverted.

The grantor spoke of the instrument as "Dannie's deed,"

and directed that care be taken of it "for him." Defendant was present, and assented both to the deed and to his mother's custody of it. The deed was thereupon taken into the possession of the mother to "take care of" for her son. The intention of the grantor is the fact to be established. "This intention may be manifested by acts or by words, or by both words and acts": *Sneathen v. Sneathen*, 104 Mo. 209; 24 Am. St. Rep. 326; *Crowder v. Searcy*, 103 Mo. 117.

We do not see what language or acts could have been used by this grantor more expressive of his intention to part with all control of the deed and to effect a perfect transfer of the title than those used by him. There being no qualifying facts, if the language and acts attributed to the grantor were used, then a complete delivery was effected, and the title passed to defendant. In view of the undisputed evidence of the intention of the grantor, there was no error in giving the instruction.

No fraud or undue influence in the execution of this deed was charged or proved, and the case was fairly tried on correct principles of law, and the judgment is affirmed. All concur.

DEEDS—DELIVERY AFTER DEATH OF GRANTOR, WHEN SUFFICIENT.—A deed delivered by the grantor to a third person to be delivered to the grantees, and by such third person delivered, is valid, though the grantor is dead at the date of the last delivery. In such case it should appear that the grantor parted with all dominion and control over the instrument, intending it to take effect as a present transfer: *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326, and note; note to *Bury v. Young*, 35 Am. St. Rep. 192, and the extended note to *Wellborn v. Weaver*, 63 Am. Dec. 246.

LANIER v. MCINTOSH.

[117 MISSOURI, 508.]

MORTGAGES.—ASSIGNMENT OF A MORTGAGE, in order to transfer the entire legal and equitable interest of the mortgagee, must be by deed containing such words of grant as show an intention of the parties to make a complete transfer. When a formal assignment is thus made, and the bond, note, or other evidence of the debt is assigned and delivered, the assignee is invested not only with the legal title but also with any power of sale contained in the mortgage.

MORTGAGES—EQUITABLE ASSIGNMENT.—The mere assignment of the mortgage debt carries with it the mortgage as an incident, and may be enforced by the assignee in his own name, and an equitable assignment is declared and enforced, by way of subrogation, whenever right and justice require it.

MORTGAGES—EQUITABLE ASSIGNMENT.—A sale of mortgaged premises, which is ineffective on account of defects in the execution of the power, operates as an equitable assignment of the mortgage to a purchaser if he pays the purchase money in good faith, and it is applied to the satisfaction of the mortgage debt.

MORTGAGES—DEFECTIVE FORECLOSURE—REALE.—Entry of record of satisfaction of a mortgage made by the mortgagee after foreclosure, under the mistaken belief that the foreclosure sale has effectually foreclosed the mortgage, is not conclusive on the purchaser who has paid the purchase money, but he may show by parol that no title passed at such sale, and may have a resale to correct the error.

MORTGAGES—DEFECTIVE SALE UNDER POWER—EFFECT OF ON PURCHASER.—A sale and conveyance of mortgaged premises, by a mortgagee or trustee acting under a power, though defectively executed, passes the legal title and estate to the purchaser subject to the right of redemption. In such case the title passes by a conveyance of the property by the person holding such title.

MORTGAGES—DEFECTIVE FORECLOSURE SALE—ESTOPPEL TO ATTACK.—A mortgagor who accepts the surplus arising from a defective foreclosure sale of mortgaged land, and contracts with the purchaser for him to hold the title as security for the money advanced and to reconvey upon being reimbursed therefor, is estopped from attacking the validity of the sale.

MORTGAGES—FORECLOSURE—OUTSTANDING TITLE—EJECTMENT.—A mere right of redemption in a third person after foreclosure of a mortgage is not such an outstanding title as defeats a recovery in ejectment. The outstanding title in such case must be such a one as the owner thereof could recover on if he were asserting it in an action.

George Hubbert, Benton and Sturgis, and A. J. Harbison, for the appellants.

H. C. Pepper, for the respondent.

313 **MACFARLANE, J.** The suit is ejectment in the usual form, to recover a parcel of land twenty-two rods and six feet long by fifteen rods and seven feet wide, in McDonald county. The answer admitted the possession of McIntosh as tenant of his co-defendant, J. D. Shields, but denied all other allegations. It also set up the following special defense:

“Defendants, for further answer, say and aver that at one time, in the year 1886, defendant, Shields, gave to one John A. Kunkel a note for the sum of two hundred and seventy dollars, to bear interest at the rate of ten per cent per annum, to secure which he executed a mortgage upon the property sued for herein, to the said Kunkel, but the same has been long paid and satisfied, so no ground of action could exist on that account against him; notwithstanding which defendants are advised, and aver, that plaintiff pretends to make some claim of right to the possession of the land as a pretended assignee of the said mortgage after condition broken.

"Defendant Shields, while protesting that the said mortgage was long ago satisfied, comes and offers to pay into the court, for the benefit of the lawful owner of the said mortgage debt, all and every sum and amount which may appear from the evidence in this case to be and remain unpaid thereon, if any, if it be found that the plaintiff is vested with the rights of the said mortgagee."

The reply admits the execution and delivery of the note and mortgage by J. D. Shields, but denies that he ever paid the note or satisfied the mortgage as charged in the answer.

In support of his title plaintiff offered in evidence the following deeds: 1. Mortgagee's deed from John A. Kunkel to J. C. Seabourn, dated October 29, ⁵¹⁴ 1887. This deed purports to convey the land under power of sale contained in the mortgage made by defendant Shields, and described in the answer; 2. Quitclaim deed from J. C. Seabourn to George W. Corum, dated May 2, 1888; 3. Mortgage deed from George W. Corum to plaintiff, L. C. Lanier, to secure note for three hundred dollars, due in ten days, with power of sale in case of default, dated April 5, 1889; 4. Mortgagee's deed from L. C. Lanier, under power of sale, to Alphonso Howe, dated May 18, 1889; 5. Quitclaim deed from Alphonso Howe to plaintiff Lanier. No date given in abstract.

The record of the mortgage from defendant Shields to Kunkel showed an entry of satisfaction on the margin, dated October 16, 1886, and signed by Kunkel, the mortgagee.

In explanation of that entry of satisfaction Kunkel testified that prior to the entry he had undertaken to sell the property under his mortgage, but misdescribed the land in both the advertisement and deed. At this sale Seabourn was also the purchaser, paying therefor three hundred and five dollars, which paid the debt and cost, and seventeen or eighteen dollars over, which was paid to Shields, as mortgagor, to whom was delivered the note and mortgage, and he then entered satisfaction. That, on learning of the misdescription of the land in the previous sale and deed, at request of the purchaser and Shields, he resold the property merely to correct the mistake. On this sale nothing was paid.

The evidence also tended to show that these purchases at mortgagee's sale were made by Seabourn at the request of Shields, his son, Abe, and Gus Corum, and Seabourn undertook it for the benefit of defendant Shields. Seabourn gave them an agreement to convey, as they should direct, upon re-

paying him. The parties borrowed the money to pay for the land, and Seabourn ⁵¹⁵ signed the note as security with the understanding that when the amount was paid he would convey as directed. Seabourn had the note to pay, but the money was afterwards repaid to him, a part by Abe Shields, but most of it by Corum, and, at the request of Shields, Abe, and Corum, he conveyed the land to the latter. The evidence is not very clear from or by whom Seabourn was repaid. The evidence shows further that the second sale made under the Shields mortgage was conducted by an agent, the mortgagee then being sick. Howe was the stepson of Corum, and married the daughter of plaintiff.

There was conflict in the evidence as to who was in possession of the property after Seabourn gave it up, which, if important, cannot be intelligently settled from what appears on the abstract.

The facts were tried by a jury, and, at request of plaintiff, the court gave the following instructions:

“The court instructs the jury that if they believe from the evidence that J. D. Shields and wife executed and delivered the mortgage deed to John A. Kunkel, read in evidence, and that after condition broken in said mortgage said Kunkel attempted to advertise and sell the land therein described, but by mistake failed to describe the said land in the advertisement and the mortgagee's deed, and that J. C. Seabourn became the purchaser at such sale, and paid the note, interest, and costs secured by said mortgage; and if the jury further find that by mistake in the first sale Kunkel entered satisfaction on the margin of the record of the said mortgage, and that thereafter, at the request of J. D. Shields, he advertised and sold the land in said mortgage deed according to the conditions therein, and executed and delivered to J. C. Seabourn the mortgagee's deed read in evidence, then such conveyance vested the legal title to the land in controversy in ⁵¹⁶ Seabourn, and that J. D. Shields is estopped from denying Seabourn's title, or those claiming under him; and the successive conveyances from Seabourn and others, claiming under him, had the effect to vest in plaintiff all right and title of defendant Shields.”

Defendant asked, but the court refused to so instruct: 1. That payment of the mortgage debt by Seabourn, the surrender of the note to Shields, and the entry of satisfaction of the mortgage on the record, extinguished the power of sale,

and the second sale and deed thereunder were nullities; 2. Though the attempted sales may have operated as an assignment of the debt and mortgage to Seabourn, yet plaintiff, by the conveyances to him, succeeded to no such rights under the mortgage as would entitle him to recover in ejectment from the mortgagor; 3. That under the pleadings and evidence defendant Shields should have been permitted to recover.

1. It is conceded that the first sale attempted by the mortgagee, in failing to describe the land, either in the advertisement or deed, did not pass to the purchaser the legal title to the property sold. The same result would follow a conveyance with a like error by the owner. It is insisted, however, by defendants that the sale, and payment of the purchase money in discharge of the mortgage debt, gave the purchaser no equitable right to the security, but operated as a complete and absolute discharge of the debt and mortgage. To that proposition we do not yield assent.

An assignment of a mortgage, in order to transfer the entire legal and equitable interest of the mortgagee, must be by deed containing such words of grant as will show an intention of the parties to make a complete transfer. When a formal assignment is thus made, and the bond, note, or other evidence of the debt is assigned and delivered, the assignee will be ⁵¹⁷ invested, not only with the legal estate, but with any power of sale contained in the mortgage: *Pickett v. Jones*, 63 Mo. 199; 1 Jones on Mortgages, sec. 786; 15 Am. & Eng. Ency. of Law, 842.

An equitable assignment does not require these formalities. In this state the mere assignment of the debt carries with it the mortgage, as an incident, which may be enforced by the assignee in his own name. And an equitable assignment will be declared and enforced, by way of subrogation, whenever right and justice require that it should be done. So it is held that a sale of the mortgaged premises which is ineffective on account of defects in the execution of the power, will operate as an equitable assignment of the mortgage to the purchaser if he paid the purchase money in good faith, and it was applied to the satisfaction of the mortgage debt: *Wilcoxon v. Osborn*, 77 Mo. 632; *Honaker v. Shough*, 55 Mo. 472; *Priest v. St. Louis*, 103 Mo. 657; 2 Jones on Mortgages, sec. 1678.

The evidence in this case shows that Seabourn purchased in good faith and paid to the mortgagee the purchase price,

which was applied to the payment of the debt secured. In this purchase he intended to buy, and supposed he had bought, the mortgaged property. He got nothing in law for the money paid, and he was in equity entitled to the security of the mortgage for the amount due on the note when paid.

2. After a foreclosure sale under a mortgage the title of the purchaser comes through the mortgage. The mortgage is not satisfied but foreclosed. It is, therefore, in such case improper to make an entry of satisfaction on the record. The entry made by the mortgagee in this case was intended to mean nothing more than that the mortgage had been satisfied by a sale of the premises. It could have no greater effect, at ⁵¹⁸ least between the parties, than the sale and deed thereunder. Indeed, after the equitable assignment of the mortgage, Kunkel, as mortgagee, as between himself and the purchaser, had no power to enter satisfaction. Entries of this kind are open to explanation by parol evidence, and a direct proceeding to impeach them is not required: *Joerdens v. Schrimpf*, 77 Mo. 384; *Valle v. American Iron Mountain Co.*, 27 Mo. 455; *Chappell v. Allen*, 38 Mo. 213.

The evidence shows very conclusively that this entry was made without authority under a mistaken idea of duty, and under the belief that the sale had effectually foreclosed the mortgage. It should not be allowed to stand in the way of the purchaser's rights.

3. As to the effect of the second sale. By a recent well-considered decision of this court rendered in Bank it was held that a sale and conveyance of the mortgaged premises, by a mortgagee or trustee acting under a power, though defectively executed, passed the legal estate to the purchaser subject to the right of redemption. In such case the title passes by a conveyance of the property by one holding the title: *Schane-
werk v. Hoberecht*, 117 Mo. 22; *ante*, p. 631.

The first sale and conveyance here was not of the mortgaged property at all, owing to a misdescription, and the legal title was not affected, but remained in the mortgagee, who held it in trust for the benefit of the equitable assignee of the debt. Though the validity of the second sale may be questioned by reason of the irregularity arising from the absence of the mortgagee when it was made, and the employment of an agent to conduct it, there can be no doubt that the legal title passed to Seabourn by the deed, and under whom plaintiff claims through mesne conveyances.

519 4. Aside from all these considerations we think the evidence conclusively shows that defendant, Shields, by his conduct and agreements, is estopped to dispute the absolute foreclosure of this mortgage. The first sale was made or attempted at his request with the information that his son would buy the property. After the sale he received from the mortgagee sixteen or seventeen dollars which remained of the proceeds of the sale after the debt had been paid. The second sale was made by Kunkel at the request of Seabourn and defendant, Shields, and for the purpose, as they declared, of correcting the mistake in the previous sale and of putting the title in Seabourn. So far as Kunkel acted it was under the direction of Shields. Shields' conduct is explained in the undisputed evidence that Seabourn, in making the purchases, was acting for him, his son, and Corum under an agreement by which he was to convey the land, according to their direction, upon being reimbursed for what he had advanced. After the title, at the request of Shields, had been vested in Seabourn a new arrangement was made wholly independent of the mortgage. Under that agreement Seabourn was to hold the title as security for the money advanced to pay the mortgage debt. Under this transaction and contract the right of redemption, if it would otherwise have existed, was clearly waived by Shields, and he was estopped to dispute the validity of the mortgagee's sales: *Austin v. Loring*, 63 Mo. 22; *Nanson v. Jacob*, 93 Mo. 346; 3 Am. St. Rep. 531; 2 Jones on Mortgages, sec. 1484.

If defendant has any remedy, it is upon the contract under which Seabourn took and held the title for him, upon which no issue was made or determined in this record.

5. Under the foreclosure sale the legal title of the heirs of Mrs. Shields, wife of defendant, who died before the first sale, if any they had, also passed to the purchaser ⁵²⁰ and no one entitled is seeking to redeem their interest. A mere right of redemption in a third person, after foreclosure, is not such an outstanding title as will defeat a recovery in ejectment. The title "must be such a one as the owner of the title himself could recover on if he were asserting it in an action. It must be a present, subsisting, and operative title": *McDonald v. Schneider*, 27 Mo. 405; *Woods v. Hilderbrand*, 46 Mo. 284; 2 Am. Rep. 513.

We see no error in the record, and the judgment is affirmed. All concur.

MORTGAGES—ASSIGNMENT OF, HOW MADE.—In this state the assignment of a mortgage must be by deed: *Voss v. Handy*, 2 Greenl. 322; 11 Am. Dec. 101. The interest of a mortgagee in land cannot in Maine pass without an assignment in some form in writing under seal: *Smith v. Kelley*, 27 Me. 237; 46 Am. Dec. 595. An assignment of a mortgage on lands must not only use words of conveyance, but must be executed and acknowledged as ordinary conveyances are by law required to be: *Sanders v. Casaday*, 86 Ala. 246. In *Runyon v. Mersereau*, 11 Johns. 534; 6 Am. Dec. 393, it was held that a mortgage could be assigned by mere delivery without writing. See the note to *Crain v. Paine*, 50 Am. Dec. 810.

MORTGAGES.—ASSIGNMENT OF A DEBT SECURED BY A MORTGAGE operates as an equitable assignment of the mortgage: *Connecticut etc. Ins. Co. v. Tulbot*, 113 Ind. 373; 3 Am. St. Rep. 655, and note; *Mitchell v. Ladew*, 36 Mo. 526; 88 Am. Dec. 156; *Lawrence v. Knap*, 1 Root, 248; 1 Am. Dec. 42; *Blair v. White*, 61 Vt. 110; *Daniels v. Densmore*, 32 Neb. 40. See, also, the notes to *Nicholson v. Learitt*, 57 Am. Dec. 508, and *Williams v. Keyes*, 30 Am. St. Rep. 442.

ASSIGNMENT OF MORTGAGE BY CONVEYANCE OF MORTGAGED PROPERTY: See the notes to *Wilson v. Troup*, 14 Am. Dec. 474; *Crosby v. Taylor*, 77 Am. Dec. 353, and *Welsh v. Phillips*, 54 Ala. 309; 25 Am. Rep. 679.

MORTGAGES.—CONVEYANCES UNDER DEFECTIVE POWER OF SALE IN: See the notes to *Bausman v. Eads*, 24 Am. St. Rep. 206, and *Wygat v. Bigelow*, 16 Am. St. Rep. 499.

GELATT v. RIDGE.

[117 MISSOURI, 553.]

REAL ESTATE AGENTS—COMMISSIONS WHEN EARNED.—A real estate broker performs his duty, and is entitled to his commission, when a purchaser is introduced who is ready, willing, and able to buy on the terms authorized by the principal, and no binding written contract of sale is required if the principal is in a situation to execute it himself.

REAL ESTATE AGENTS—WHEN ENTITLED TO COMMISSIONS.—A real estate agent is entitled to his commissions if he is the procuring cause of negotiations which result in a sale, even though the negotiations are conducted and concluded by the principal in person.

REAL ESTATE AGENTS—RATIFICATION OF CONTRACT OF—COMMISSIONS.—Though a contract of sale made by a real estate agent varies from the terms of his authority, yet, upon approval and ratification by the principal, as made by the agent, it becomes a part of the original contract, and the agent's commissions as fixed therein govern.

REAL ESTATE AGENTS—COMMISSIONS—EVIDENCE.—In an action by a real estate broker to recover commissions on a sale, a deed executed by the principal after suit is instituted is admissible to show a ratification of the broker's contract.

PRACTICE—WAIVER OF OBJECTION.—An objection to an amended petition as being a departure from the original is waived by pleading over and going to trial without making objection.

REAL ESTATE AGENTS—COMMISSIONS WHEN EARNED.—A real estate broker who produces a buyer who is ready, willing, and able to carry out the contract of sale as authorized by the principal, is entitled to his commissions, although such buyer is acting in behalf of another person.

Hayward and Griffin, for the appellant.

Pratt, Ferry, and Hagerman, for the respondent.

⁵⁵⁶ **MACFARLANE, J.** The action is to recover commission by plaintiff, a real estate agent, for the sale of land for defendant under authority contained in the following writing:

"KANSAS CITY, Mo., March 14, 1889.

"I hereby authorize J. M. Gelatt to sell my property at 1116 Main—24ft. 8in.—for the sum of seventy thousand dollars; thirty thousand of which is to be paid in cash within thirty days of this date, ten thousand of which cash is to be paid within three days from date, and the remainder of my equity, twenty-three thousand dollars, to be paid in six months, with interest at the rate of six per cent. The purchaser of said premises is to pay an encumbrance of seventeen thousand dollars, bearing seven per cent interest, which is now on said property and falls due in January, 1890. Should Mr. Gelatt sell said property on the above terms I am to give him fourteen hundred dollars, and any excess obtained for said property above said price to be his.

"THOMAS S. RIDGE,

"J. M. GELATT."

On the next day, March 15, 1889, plaintiff agreed with J. F. Brady for the purchase of the property upon the terms set forth in the following receipt which was given at the time:

"Received of J. F. Brady, five hundred dollars as earnest money in the purchase of Thomas S. Ridge's property, 1116 Main street, Kansas city, Missouri, at a price of seventy-three thousand dollars; ten thousand dollars of the same to be paid within two days from this date, of which five hundred has been paid, and twenty-five thousand dollars when deed is delivered, and twenty-one thousand six months from date of deed at six per cent and assume seventeen thousand ⁵⁵⁷ dollars due January, 1890, with seven per cent interest from date of deed to said Brady.

J. M. GELATT,

"Authorized agent for THOMAS S. RIDGE."

The evidence tended to prove—indeed, there is but little conflict on this point—that immediately after agreeing upon the terms of sale, and the execution of this receipt, the parties met defendant, the contract as made was submitted to and approved by him, and it was then arranged for a subse-

quent meeting at which a written contract should be prepared and signed, and the balance of the cash payment made. At this first meeting it was disclosed that a tenant occupied a portion of the premises, but the evidence tends to prove that defendant agreed to arrange with him. At the subsequent meeting, held a day or two afterwards, defendant refused to carry out the contract unless the purchaser would take the property subject to the lease, which he at the time declined to do. That Brady was able, ready, and willing to carry out the contract is unquestioned.

After refusal of defendant to execute the contract as made, the purchaser, John F. Brady, in the name of his brother, M. J. Brady, for whom the purchase was really made, commenced a suit for a specific performance of the contract. Pending this suit, and on June 27, 1889, Brady agreed to assume the lease, and a contract was made in the name of M. J. Brady, according to the terms of the original sale, with this exception as to the lease, and with the exception that the contract recited a consideration of \$72,500, the \$500 cash payment having been retained by plaintiff as part of his commission. The contract provided that defendant should allow Brady for the rents of the premises from April 14, 1889, and the note for the unpaid purchase money should bear date from March 14, 1889, the day ⁵⁵⁸ of the original sale. The deed and deed of trust executed in pursuance of this contract were made to and by J. F. Brady, were dated June 28, 1889, and recited a consideration of seventy-three thousand dollars.

The suit was commenced March 23, 1889, and an amended petition filed in October of the same year. The amended petition charged the authority to sell, and agreement as to the commission as contained in the written contract, a sale on the terms contained in the receipt, a ratification of the sale upon those terms, and the final consummation of the sale by the execution of the deeds in June, 1889. The answer charged that defendant, before the alleged sale, informed plaintiff of the leasehold interest on the property held by another, and instructed him that any sale should be made subject to the lease, and that Brady, the purchaser, refused to take the property subject to the lease. The answer also charged collusion between plaintiff and the purchaser, by which the sale was to be made without reference to the lease, and for which plaintiff was to receive a commission from Brady. There was no

evidence to sustain this charge. The answer admitted the execution of the writing giving plaintiff authority to sell, but denied each other allegation of the petition.

At the request of the plaintiff the court gave the jury this instruction:

"If the jury find from the evidence the following facts: 1. That the plaintiff was employed by defendant to sell the real estate known as 1116 Main street, Kansas City, Missouri, under the written authority read in evidence dated March 14, 1889; 2. That plaintiff, acting under his said employment, and without the same being modified, made a contract to sell said property to one Brady, on the terms specified on the written receipt and memorandum read in evidence, dated March 15, 1889, and signed ⁵⁵⁹ J. M. Gelatt, agent for Thomas S. Ridge; 3. That plaintiff, after making said contract, brought the parties together; that the terms of the sale were fully explained to defendant, and were agreed to and approved by him, and the action of Gelatt was accepted as a complete performance of his obligation, and the purchaser was ready, willing, and able to pay; 4. That afterwards the defendant for a time declined to make the deed to Brady until a suit was brought to compel the enforcement of said contract; 5. That afterwards, on or before June 28, 1889, the defendant and Brady settled the controversy by a consummation of the sale, at the price and on the terms of the contract negotiated by plaintiff, with certain exceptions as to a certain lease in favor of a tenant then in possession; 6. That the defendant then consummated the sale by the execution of the deed to Brady, which is in evidence, and by taking from him the mortgage or deed of trust which also is in evidence, and plaintiff has received but five hundred dollars for his services; then if you find these facts, the court instructs the jury that they must find for the plaintiff on the first count, and assess his damages at three thousand nine hundred dollars, with six per cent interest from June 28, 1889."

At the close of all of the evidence, defendant asked an instruction in the nature of a demurrer to the evidence, which was refused.

At the request of the defendant the court gave the jury two instructions, as follows:

"The court instructs the jury that if they believe from the evidence that after defendant executed to plaintiff the authority in writing to sell defendant's real estate referred to in

plaintiff's amended petition, but before plaintiff gave the receipt to J. F. Brady, referred to in plaintiff's amended petition, defendant orally informed plaintiff that there was a lease to one ⁵⁶⁰ Laveine on said real estate, and the purchaser must take the property subject to said lease, and the purchaser refused to purchase subject to said lease, then plaintiff cannot recover.

"The court instructs the jury that unless the plaintiff sold defendant's real estate on terms given him by defendant, or procured a customer therefor ready, willing, and able to purchase defendant's property on such terms, plaintiff cannot recover unless they shall further find that defendant, after having been fully informed of the variations made by plaintiff on selling said real estate from the instructions given him, approved of these variations and ratified the contract of sale as made by plaintiff."

An instruction declaring the rights of the parties in case plaintiff informed Brady of the lease, before the execution of the receipt asked by defendant, was refused. There was no evidence to authorize the instruction, and its refusal is not insisted upon as error. The judgment was for plaintiff, and defendant appealed.

1. The first objection urged by appellant as ground for reversal is, that the receipt, being only signed by the agent in behalf of his principal, could not be enforced by the purchaser who had not signed it, and is, therefore, not such a sale of the property as was contemplated under the authority given. It is well settled in this state that a real estate broker performs his duty and is entitled to his commission when a purchaser is introduced who is ready, willing, and able to buy on the terms authorized by the principal. The completion of a valid and binding written contract is not required in case the principal is in a situation to execute it himself. It may, and doubtless often does, happen that the purchaser would prefer dealing directly with the owner. So it is held that the agent is entitled to his commission if he is the procuring cause of negotiations ⁵⁶¹ which result in the sale, even though the negotiations are conducted and concluded by the principal in person: *Bell v. Kaiser*, 50 Mo. 150; *Tyler v. Parr*, 52 Mo. 249; *Timberman v. Craddock*, 70 Mo. 638.

2. It is next contended that there can be no recovery, for the reason that the contract made by the agent varied from the terms of his authority, and that this would be the case

though the terms of the sale made were more advantageous to the principal than was required under the letter of authority. There is no doubt, as a general principle of law, that an agent must act within the terms of his authority, and a substantial variance therefrom would defeat his right to compensation, though such variance may have been advantageous to his principal: *Nesbitt v. Helser*, 49 Mo. 384. Yet it is equally well settled that if the principal ratify the contract made by the agent, the substituted terms become a part of the original agreement, and can be enforced as such: *Woods v. Stephens*, 46 Mo. 556, and cases cited.

The evidence tends to prove—indeed it is very conclusive—that defendant did fully approve and ratify the terms of sale as made by plaintiff, and under the instructions the jury must have so found.

3. The suit was not upon a *quantum meruit*, as claimed by defendant, but was upon the original contract as made and supplemented by the ratification and acceptance of defendant. If, as before stated, the departure, by the agent, from the terms of the authority given him, became, upon approval and ratification by the principal, a part of the original contract, the compensation, if fixed therein, should be measured thereunder: *Nesbitt v. Helser*, 49 Mo. 384.

4. Objections were made to the introduction in evidence of the deed made by the defendant to Brady, ⁵⁶² and the deed of trust back to secure a part of the purchase money, which were dated June 28th, and after the commencement of the suit. These were admissible, not as a necessary part of the original cause of action, but as evidence of the ratification of the contract made by plaintiff. They show that the terms agreed upon were substantially carried out by defendant. A recovery could have been sustained without this evidence, and plaintiff took upon himself an unnecessary burden in making the execution of the contract necessary to a recovery, as was done under his amended petition and the instructions asked and given. This could afford to defendant no just ground of complaint.

5. Though the charge, in the amended petition, of the execution of the deed by defendant in conformity to the terms of the sale made by plaintiff, may have been a departure from the original petition, the fact charged having accrued subsequent to the commencement of the suit, and was also prejudicial to defendant, yet by pleading over and going to trial

on the amended petition, no objection having been made thereto, all error, on account thereof, must be taken as waived: *Scovill v. Glasner*, 79 Mo. 454; *Spurlock v. Missouri Pac. Ry. Co.*, 93 Mo. 537.

6. It is insisted finally that no sale was made by plaintiff, for the reason that J. F. Brady, to whom the sale purports to have been made, was acting in behalf of his brother, M. J. Brady, for whom the purchase in fact was made. We are unable to see any force in this reason. J. F. Brady showed himself ready, willing, and able to carry out the contract as made, and it could make no difference that he was acting in behalf of another. Defendant testified also, that, in his first interview with plaintiff, after the sale had been made, he was informed that the land was intended for M. J. Brady, and this name was then, without objection, written in the contract. It is true that this contract ⁵⁶² was not signed by the parties at that time, for other reasons; but the one finally executed on the 27th of June was in the name of M. J. Brady, though the deed made on the next day conveyed the land to F. J. Brady, the original purchaser. Under his authority plaintiff was not restricted in his right to sell to any particular person or class of persons. The judgment is affirmed. All concur.

BROKERS—COMMISSIONS, WHEN EARNED.—Before a broker can recover commissions for selling property, it must appear that he procured a purchaser of sufficient pecuniary ability to make a purchase: *Butler v. Baker*, 17 R. L. 582; 33 Am. St. Rep. 897, and note; but he is entitled to his commission if he finds a purchaser satisfactory to his employer, even though it turns out afterwards that he is unable to comply with the contract of purchase and sale into which he had entered: *Kalley v. Baker*, 132 N. Y. 1; 28 Am. St. Rep. 542, and extended note. See the extended note to *Walker v. Osgood*, 93 Am. Dec. 175-178; and *Ward v. Cobb*, 12 Am. St. Rep. 589.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

BLOOMER V. NOLAN.

[36 NEBRASKA, 51.]

INFANTS, RESTITUTION OF CONSIDERATION UPON AVOIDANCE OF CONTRACTS BY, WHAT NECESSARY.—One seeking to avoid a contract on the ground of infancy will be required to make restitution only of that part of the consideration still in his hands, when he attains his majority, or when he elects to disaffirm. It is not necessary as a condition to such relief, that he should return an equivalent for property wasted or squandered.

INFANTS, LANDS OF, NOT SUBJECT TO MECHANIC'S LIEN.—There can be no mechanic's lien on the lands of a minor whether he represents himself to be of full age or not, and if a materialman bases his claims upon the ratification of a contract out of which a lien might arise, he must prove that the landowner has intentionally acknowledged the obligation of the contract, after the attainment of his majority. To establish such a ratification, it is not sufficient to show that he has retained the property and collected the rents therefrom.

MECHANIC'S LIEN—MATERIALMAN MUST PROVE CONTRACT WITH LANDOWNER.—To entitle a materialman to recover under the provisions of the mechanic's lien laws, it is not enough to prove the furnishing of the material for which the lien is claimed, and the due filing of the verified account thereof. He must also show that the material was furnished in pursuance of an agreement, express or implied, with the owner or his agent.

Sedgwick and Power, for the appellants.

George B. France, contra.

⁵² Post, J. This was an action in the district court of York county to foreclose a mechanic's lien. Decree was entered in favor of the plaintiff in accordance with the prayer of his petition, from which the defendants have appealed. In his petition the plaintiff alleges that on or about the eighteenth

day of August, 1886, he entered into a verbal contract with the defendants, by virtue of which he was to furnish them building material for the erection of a dwelling-house upon premises owned by them, to wit: a quarter section of land in said county, and that in pursuance of said contract he furnished to defendants, between the date last named and the seventeenth day of September, 1886, building material to the amount and of the value of two hundred and twenty-four dollars and ninety-eight cents. It also appears from the petition that an itemized statement of the account, duly verified, was filed with the county clerk within four months from the time of furnishing of said material. The defendants filed separate answers, that of Mosher being a general denial, while Nolan, in addition to a general denial, alleges that at and during all the times mentioned in the petition he was a minor under twenty-one years of age. The reply to the answer of Nolan is a general denial. The ground of the judgment against the last-named defendant is not clear from the record. It is ⁵³ true that he purchased the material, as alleged by the plaintiff, but it is clear from the undisputed evidence that he was at the time a minor, but nineteen years of age. There is no foundation for the contention that he has ratified the contract since attaining his majority: 1. Because that question is not put in issue by the pleadings; and 2. Because there is no sufficient evidence to support such a contention. There is no evidence whatever of an express ratification, neither will a ratification be inferred from the retention of the property by him.

The rule is well settled that one who seeks to avoid a contract on the ground of infancy will be required to make restitution of so much of the consideration only as is retained by him when he attains his majority, or when he elects to disaffirm: *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233; *Jenkins v. Jenkins*, 12 Iowa, 195; *Burgett v. Barrick*, 25 Kan. 526; *Bartlett v. Drake*, 100 Mass. 174; 97 Am. Dec. 92; 1 Am. Dec. 101; *Reynolds v. McCurry*, 100 Ill. 356; *Craig v. Van Bebbler*, 100 Mo. 584; 18 Am. St. Rep. 569; *Price v. Furman*, 27 Vt. 268; 65 Am. Dec. 194; Taylor on Infancy, 2d ed., 37. The law which is designed to protect the young and inexperienced would be ineffectual for that purpose if an infant was required, as a condition to relief, to return an equivalent for property wasted or squandered. It is clear also from the evidence in the record that Nolan had no interest in the property

at the time he attained his majority, and was incapable of making restitution. But the rule which requires restitution has no application to cases like the one under consideration. "There can be no mechanic's lien upon the land of a minor, for he can make no contract which is binding upon himself or property. The lien is incident only to a legal liability to pay a debt. It is immaterial that the minor represented himself to be of age. Even if there be a contract for erecting buildings upon a minor's property with his guardian, no lien is conferred, if the guardian had no authority in law to make the contract. Of course a minor may ratify a contract made ⁵⁴ during his minority out of which liens might arise. But such ratification cannot be implied from his retaining his property and collecting rents from it. The ratification must be an intentional acknowledgment of the obligation of contract": Jones on Liens, sec. 1239. The infancy of Nolan is a complete defense and the judgment against him cannot be sustained.

It remains to be determined whether the judgment against Mosher and the decree of foreclosure against the premises described is sustained by the evidence. From the testimony of the plaintiff it appears that the contract under which he furnished the lumber was made with Nolan on the thirtieth day of July, 1886, and a considerable part thereof furnished prior to August 28th following. On the last-named day, Mosher, who then owned the land, conveyed it by deed to Nolan who, on the same day, mortgaged it to the New Hampshire Banking Company for twelve hundred dollars, and immediately reconveyed to Mosher, in whom the record title has remained. In plaintiff's direct examination he does not mention Mosher's name in connection with the contract, except to state that he was informed by Nolan that the lumber was to build a house on the Ed Mosher place. On cross-examination he is asked.

Q. You had nothing to do with Mr. Mosher about this contract did you?

A. I made no contract with him personally; no, sir.

Q. Did Mr. Mosher ever have any talk with you in regard to furnishing the lumber bill?

A. No, sir.

Q. Did you charge the lumber to Mr. Mosher?

A. It is n't charged to Mr. Mosher.

Q. Did you charge it to Mosher on your books?

A. No, sir.

It is also apparent from his cross-examination that the first written charge against Mosher was at the time of the filing of the lien.

⁵⁵ Mosher testifies in his own behalf that he did not authorize the purchase of the lumber by Nolan, and had no knowledge of its having been used on the premises until after the completion of the building. It appears that his home was in the city of York, and according to his testimony he did not visit the premises between the time the lumber was procured by Nolan and the following spring. The execution of the two deeds and the mortgage on August 28th is explained by him thus: He had agreed to trade the quarter section in question to Nolan for an eighty-acre tract owned by the latter, and an additional consideration which does not clearly appear from the record. The conveyance was made to enable Nolan to raise the money by mortgaging to the New Hampshire Banking Company, for which Mosher was agent. The money received as the proceeds of the mortgage was paid to Mosher, who executed a bond for a deed in favor of Nolan, who had already gone into possession, and who continued in possession of the premises until October 17, 1888, on which day he executed a deed therefor to Mosher. The last-named deed purports to convey the property, subject to the mortgage in favor of the New Hampshire Banking Company, and contains the following recital: "All mechanics' liens appearing of record against said premises are invalid and illegal." According to the testimony of Mosher it was executed in consequence of the fact having come to his knowledge that Nolan was a minor at the time of the execution of the first conveyance by him. To entitle a materialman to recover under the provisions of section 1 of the mechanics' lien law, it is just as essential for him to prove a contract or agreement, express or implied, with the owner or his agent, as it is to prove the furnishing of the material claimed for or the filing of the verified account thereof with the register of deeds: Jones on Liens, 1235, 1236. It is suggested that the decree for plaintiff may be sustained on the ground that Nolan was acting as the agent of Mosher in the ⁵⁶ purchase of the lumber. That contention, however, has no foundation in the record, for the evidence clearly proves that Mosher not only did not authorize the purchase of the lumber, but was ignorant of the building of the house until long after its completion. We are satisfied, after

a careful examination of the record, that the plaintiff is not entitled to a lien, and the decree of the district court should be reversed, and the action dismissed.

Reversed and dismissed.

The other judges concur.

INFANTS—RESCISSION OF CONTRACTS—RETURN OF CONSIDERATION.—A minor may avoid his contract without putting the other party in *status quo*, or returning the consideration received, if the contract was not for necessities, nor necessarily beneficial to the minor: *Dube v. Beaudry*, 150 Mass. 448; 15 Am. St. Rep. 228, and note; *Moore v. Baker*, 92 Ky. 518. This question is thoroughly discussed in *Craig v. Van Bebber*, 100 Mo. 584; 18 Am. St. Rep. 569, and extended note at page 687.

MECHANIC'S LIEN ON LANDS OF INFANT.—A mechanic's lien cannot be acquired against the property of an infant: *Alvey v. Reed*, 115 Ind. 148; 7 Am. St. Rep. 418. See the note to *Craig v. Van Bebber*, 18 Am. St. Rep. 592, for a further discussion of this question.

MECHANIC'S LIEN—MATERIALMAN MUST PROVE CONTRACT WITH LANDOWNER.—A lien is imposed upon real estate only when materials are furnished in pursuance of some contract with the owner, or when his consent is in some way established: *Spruck v. McRoberts*, 139 N. Y. 193; *Whittier v. Puget Sound Loan etc. Co.*, 4 Wash. 606; 31 Am. St. Rep. 914, and note. A mechanic's lien cannot exist except where there was a valid contract for the doing of work or the furnishing of materials: *Fish v. McCarthy*, 96 Cal. 484; 31 Am. St. Rep. 237, and note.

HOWELL v. ALMA MILLING COMPANY.

[96 NEBRASKA, 80.]

APPEAL BONDS, SURETIES ON, NOT DISCHARGED BY SUBSTITUTION OF ANOTHER PLAINTIFF, WHEN.—A surety on an appeal bond is not discharged by the fact that a person to whom the plaintiff's interest in the subject matter of the action has passed, while the appeal is pending, is substituted as a party plaintiff without the knowledge or consent of such surety, and allowed to prosecute the appeal in his own name.

APPEAL BOND, SURETIES ON, NOT DISCHARGED BY CONTINUANCES GRANTED BY AGREEMENT OF PARTIES.—The fact that the various continuances of a case in the appellate court have been granted upon stipulations between the parties, without the consent of the surety on the appeal bond, will not, in the absence of proof of fraud, or of collusion between the principal and his creditor, operate to release such surety.

APPEAL BONDS, SURETIES ON, NOT DISCHARGED BY RENDITION OF JUDGMENT UPON STIPULATION.—In the absence of proof of fraud, or of collusion between the appellant and respondent, a surety on an appeal bond is not discharged by the fact that judgment is finally rendered against his principal by agreement between the parties, without his knowledge or consent.

Smith and Solomon, for the plaintiff in error.

Case and McNeny, and *C. C. Flansburg*, contra.

§1 NORVAL, J. This action was brought by the plaintiff in error upon an appeal undertaking. There was judgment in the court below for the defendants. To reverse this judgment a petition in error was filed in this court. The facts briefly stated are these:

On the first day of November, 1885, the Nebraska Lumber Company turned over a large number of notes to the Commercial National Bank of Omaha as collateral security for money borrowed. Among the notes so turned over were two against the Alma Milling Company; one for three hundred and sixty-one dollars and eighty-five cents, and the other for three hundred and twenty-six dollars, exclusive of interest. Afterwards, on the thirtieth day of December, 1885, the Nebraska Lumber Company assigned, subject to the rights of said bank, the same securities, including the said two notes executed by the Alma Milling Company, to the plaintiff, as collateral security for a debt from said lumber company to plaintiff.

On the seventh day of June, 1886, the said Commercial National Bank brought suit in the county court of Harlan county against the said Alma Milling Company upon the two notes above mentioned, and recovered judgment thereon for the sum of seven hundred and twenty-three dollars and thirty-seven cents and costs. From this judgment the Alma Milling Company took an appeal to the district court, the defendant in error, F. E. Goble, signing the appeal bond or undertaking as surety; which bond was conditioned **§2** that the principal should prosecute its appeal to effect without unnecessary delay, and if judgment should be adjudged against it on appeal, satisfy such judgment and costs.

While said cause was pending on appeal in the district court, the claim of the said Commercial National Bank against the Alma Milling Company, for the payment of which said notes were held as collateral security, was paid and discharged in full, so that said bank was no longer the real party in interest in said suit. The collateral notes were turned over to the plaintiff in error by virtue of the agreement above referred to, made between the Nebraska Lumber Company and said George W. Howell. After the notes were so turned over on the twenty-third day of November, 1881, the said Howell, the plaintiff in error herein, was substituted as a party plaintiff in said action in lieu of the Commercial National Bank. It was agreed between the plaintiff in error

and the Alma Milling Company that in case the latter would consent or allow the former to be substituted as plaintiff for the bank, that said cause should be continued to February 20, 1888; that in accordance with said agreement said cause was so continued without the knowledge or consent of the surety. Said cause was subsequently continued from time to time by stipulation of parties in open court until May 6, 1889, when judgment was rendered against said Alma Milling Company by agreement between it and the plaintiff for the sum of nine hundred dollars and costs of suit. Execution has been issued on said judgment, and returned unsatisfied for want of property whereon to levy. Whereupon this action was brought upon said appeal undertaking to recover the amount of said judgment and costs.

It is contended by counsel for defendants in error that the substitution, after the cause was appealed to the district court, of plaintiff in error as party plaintiff in place of the Commercial National Bank, the original plaintiff, without ~~the~~ the knowledge or consent of F. E. Goble, the surety, in the appeal bond, operated as a release of the surety. We consider the position altogether untenable. We are unable to perceive how the substitution of George W. Howell as plaintiff in lieu of the bank could have the effect to discharge the surety. The reason for the substitution arose solely from the fact that the indebtedness of the Alma Milling Company to the bank had been fully paid off after the appeal had been taken. The bank, therefore, no longer had any interest in the litigation. The notes declared on prior to the institution of the action had been pledged by the Nebraska Lumber Company to plaintiff in error as collateral security for its indebtedness to him, so that when the claim of the bank was satisfied plaintiff in error was entitled to prosecute the suit either in his own name or in the name of the bank.

Section 45 of the Code of Civil Procedure, which was in force when the appeal was taken, provides that "An action does not abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, during its pendency, if the cause of action survive or continue. In the case of the marriage of a female party, the fact being suggested on the record, the husband may be made a party with his wife; and in case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest. In case of any other transfer of

interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action." There can be no doubt that under this statute the payment by the Nebraska Lumber Company of its indebtedness to the bank did not abate the action on the collateral notes. The section quoted confers ample power upon a court, where there has been a transfer by the plaintiff of his interest in the subject of the action during the pendency of the suit, to allow the person to whom the transfer ⁸⁴ is made to be substituted in place of the original plaintiff. The substitution was made according to the provision of the statute. It is conceded that plaintiff in error had a right to be substituted as plaintiff in place of the bank, but it is urged that the surety is not liable on his bond for a judgment obtained by the substituted party against the principal. The law permitting the substitution of parties in case of the transfer of interest must have been known to the surety in the appeal undertaking when he became surety, and he must be held to have signed the bond subject to such contingency. In this case it is stipulated that at the time Goble signed the appeal undertaking he knew that the notes were held as collateral security, and was informed and believed that the claim of the bank against the Alma Milling Company would be paid by the collection of other securities held by the bank. The surety knew in case the bank ceased to have any interest in the notes sued on during the pendency of the action, that the court had the power to permit the substitution of the party interested in the subject of the suit. The surety took this risk of substitution. He was not in the least prejudiced by the change of plaintiffs. The cause of action remained the same. He was not placed in a worse situation, for had there been no substitution Howell could have prosecuted the suit to judgment in the name of the original plaintiff: *Magenau v. Bell*, 13 Neb. 247; *Temple v. Smith*, 13 Neb. 513; *Dodge v. Omaha etc. R. R. Co.*, 20 Neb. 276.

The undertaking of the surety was that his principal should prosecute its appeal to effect without unnecessary delay, and that the principal should satisfy any judgment which should be rendered against it in the appeal. The surety was responsible for any judgment which should be rendered against the principal on the cause of action sued on, whether obtained by the original plaintiff or a substituted party. We are satisfied that the substitution of Howell as plaintiff in lieu of the bank

did not release the ⁸⁵ surety from liability on the appeal undertaking: *Hanna v. International Petroleum Co.*, 23 Ohio St. 622; *Christal v. Kelly*, 88 N. Y. 285; *Sherry v. State Bank of Indiana*, 6 Ind. 397.

There are some Tennessee decisions cited in the brief of counsel for defendants in error which are not in harmony with the views we have already expressed, but they are not well-considered cases, and are in conflict with the weight of authority in this country.

The case of *Andre v. Fitzhugh*, 18 Mich. 93, is distinguishable from the one at bar. There an attachment suit was commenced against three defendants, and the sheriff levied the writ upon certain personal property. To prevent the removal of the attached property, a statutory bond with sureties was executed, conditioned that if the obligors should well and truly pay any judgment which might be recovered by the plaintiff in his attachment suit within sixty days after the judgment should be recovered, then the obligation should be void, but otherwise of force. On the trial of the attachment suit the plaintiff discontinued as to two of the defendants in attachment without the consent of the sureties, and obtained judgment against the third for four thousand, six hundred and ninety-two dollars and sixty-one cents. The judgment not having been paid, suit was commenced upon the bond to recover the amount of said judgment. The supreme court ruled that the discontinuance as to the two defendants in attachment operated as a discharge of the sureties on the bond. This decision is placed upon the ground that the discontinuance as to the two defendants increased the risk of the sureties. The court in the opinion say: "The sureties on entering into the contract measure the risk they incur by the chances which the plaintiff has to recover against the defendants in the writ, and the ability of the latter, in case of defeat, to refund to the plaintiff or sureties themselves, if called on." The court, in speaking of such change of parties, say: "It would have the effect to compel ⁸⁶ the sureties to look for indemnity to such defendant or defendants as should be left in the case at judgment, instead of the whole number of defendants named in the writ at the giving of the bond; and it might well happen that in the responsibility of the latter the sureties would know themselves to be safe, while in that of the former they would know themselves to be without remedy."

In the case we are considering, the risk of the surety was not increased by the substitution of Howell as plaintiff; hence the Michigan case is not in point. The fact that the original suit was continued from time to time by agreement, without the consent of the surety, did not operate as a release of the latter, nor did the rendition of the judgment by consent of the principal in the bond have the effect to discharge the surety from liability. The court had the power to grant the continuances irrespective of the agreement of the parties. Had it done so on the application of either party without the consent of the other, the surety would have been bound, since his undertaking contemplated a possible exercise of such power. The fact that the continuances were granted upon the stipulation of the parties does not, we think, make any difference. By the execution of the appeal bond the surety conferred upon his principal authority to do every thing that was necessary to be done in the case. The condition of the bond was sufficiently broad to include whatever judgment might be rendered against the principal in the appeal case, whether by agreement or otherwise. In the absence of proof of fraud or collusion between the principal and the creditor, the stipulations did not have the effect to release the surety from liability on the appeal bond: *Boyn-ton v. Phelps*, 52 Ill. 210; *Bailey v. Rosenthal*, 56 Mo. 885; *Chase v. Beraud*, 29 Cal. 138.

Boyn-ton v. Phelps, 52 Ill. 210, was an action against a principal and his sureties upon an injunction bond given in a suit brought by a judgment debtor to restrain the collection ⁸⁷ of a judgment at law. The plaintiff in the injunction suit, without the consent of his sureties, dismissed his action by agreement with the owner of the judgment. It was held, in the absence of fraud and collusion between the parties, that the mere dismissing of the injunction suit by consent did not discharge the sureties on the bond.

In the Missouri case cited the defendant appealed from a judgment rendered by a justice of the peace, and in the appellate court the plaintiff took a voluntary nonsuit, which was subsequently, during the same term, set aside by agreement between the parties without the consent of the sureties on the appeal bond. The case was then tried, and judgment was rendered against the defendant and his sureties. It was held that the sureties were liable for such judgment.

In *Chase v. Beraud*, 29 Cal. 138, it was decided that where an

appeal was dismissed by agreement between the principal in the appeal bond and the creditor it operates as an affirmation of the judgment and charges the surety in the appeal bond.

In *Ammons v. Whitehead*, 31 Miss. 99, certain parties became sureties on three bonds given to secure appeals from three judgments rendered by a justice of the peace against the same defendant and in favor of the same plaintiff. In the circuit court the three cases were consolidated by agreement of the parties, and afterwards, by stipulation between the principal and creditors, without the assent of the sureties, a judgment was rendered in said court against the principal and sureties with stay of execution for twelve months. It was held that the sureties were not released from their liability. This being a well-considered case we reproduce a portion of the opinion here. The court said that "the bonds were executed for the purpose of having the cases retried in the circuit court, and their legal effect was to give that court jurisdiction to determine the cases, and to render judgment, if necessary, against both the ^{ss} principal and sureties. Their condition was, substantially, that if the judgments should be there affirmed, they would abide by and perform the judgment of the court to be rendered thereupon. From their very nature, the obligation of the sureties was contingent and uncertain. They were given for the express purpose of enabling the principal to carry on the litigation, and, in the event that he should be unsuccessful, the law under which they were given provided that the judgment should be rendered against both the principal and sureties. Even if the sureties are not to be considered bound as parties to the judgment, so as to be debarred of the right to complain in a collateral proceeding of what was done in the proceeding, the necessary legal effect of their execution of the bonds was to confer upon the principal full power to do whatever he might deem necessary and proper in defending or determining the suits in the circuit court. The principal might have withdrawn all defense and submitted to judgments in the three cases immediately upon their presentation in the circuit court, and upon the same reason he was authorized to compromise the suits upon terms advantageous to himself. This was no violation of the obligation of the sureties, nor a variation of the terms of their obligation, for that was entirely contingent and uncertain, except that the parties had, by the necessary legal effect of the act, submitted themselves to whatever might be done in

the determination of the suit by their principal, under the sanction of the court. There was no fixed obligation, the terms of which were varied by the creditor and principal, so that the sureties were deprived of the right of subrogation; nor did the stay of execution deprive them of any right or security which existed in their behalf before the rendition of the judgment and the entry of the stay. And whether the sureties be regarded as parties to the judgment, and as such bound by the proceedings in the suit, or as bound by the action of their principal by reason of the power necessarily ^{so} conferred upon him by the purpose and legal effect of the bonds, it is clear that the sureties are not within the rule which discharges such parties in consequence of indulgence given to their principal."

The cases on which defendant relies are not in point, as a brief reference to them will show. In *MacKay v. Dodge*, 5 Ala. 888, two parties agreed to submit certain matters in dispute between them to the award of certain specified persons. Afterwards a third person signed, as surety, a bond for one of the parties, conditioned that the principal would perform the award which might be made against him on the submission. Subsequently, without the consent of the surety, by agreement between the parties, two persons were substituted in place of two of the arbitrators who failed to attend, and an award was made. The court held, in an action on the bond, that the change in the arbitrators was such an alteration of the original contract as exonerated the surety from liability. It is plain that there was a material change in the contract. The surety obligated himself that his principal should perform an award made by certain designated arbitrators, and not one made by any other or different person. The change of arbitrators was a new contract, which was not binding on the surety. *Johnson v. Flint*, 34 Ala. 673, was a suit on a bond executed to secure an appeal of a cause to the supreme court. In the appellate court an agreement was entered into between the parties to the appeal, without the knowledge or consent of the sureties on the appeal bond, to the effect that the judgment should be affirmed for a specified sum, which was four hundred dollars less than the superseded judgment, and that a certain mill and machinery in controversy were to be the property of the appellee. It was held that the sureties on the bond were released. The ground of this decision is, that by the new agreement entered into without the consent of the sureties, founded upon a suffi-

cient consideration, by which the parties stipulated for mutual advantages, the ⁹¹ principal was precluded from prosecuting his suit to effect. In the case at bar the contract of the sureties was not varied or changed. The agreement between the creditor and principal, that judgment should be rendered against the latter, was a mere voluntary and discretionary exercise of authority on the part of the principal. He secured no concessions or advantage for signing the agreement. There was merely a waiver by the principal of his defense to the suit if he had one, and of such a waiver all the authorities hold the surety cannot take advantage. We are persuaded that the mere fact that the principal consented to the rendition of the judgment does not affect the liability of the surety. *Johnson v. Planters' Bank*, 4 Smedes & M. 165, 43 Am. Dec. 480, was an action against Johnson as surety on a promissory note. The principal on the note had died, and his estate was regularly administered, but the note had not been presented as a claim against the estate within the time prescribed by statute. It was decided that the surety was not thereby discharged. The case lacks analogy, and is not an authority on the question we are considering. The other cases cited by counsel for the defendant are not in point.

We are forced to the conclusion that the district court erred in holding that the surety was not liable. The judgment of the district court is reversed and the cause remanded.

Reversed and remanded.

The other judges concur.

Liability of Sureties on Appeal Bonds.

1. RULE AS TO STRICT CONSTRUCTION OF CONTRACT OF SURETYSHIP, MEANING OF.—The controlling principle which, in the absence of other considerations, determines the liability of one who executes an appeal bond, is, as in the case of other contracts of suretyship, that he is entitled to stand upon the express terms of his contract. This rule, however, does not imply that a strained construction is to be put upon the words of the bond in favor of the surety, or that it may have one force and meaning when the principal is defendant, and a different force and meaning when the surety is defendant. As was observed in *Shreffler v. Nadelhoffer*, 133 Ill. 536, 23 Am. St. Rep. 626, "the rule of strict construction, as applied to the contracts of sureties and guarantors, in no way interferes with the use of the ordinary tests by which the actual meaning and intention of contracting parties are ordinarily determined, but merely limits their liability strictly to the terms of their contract when those terms are ascertained, and forbids any extension of such liability by implication beyond the strict letter of those terms." So, also, in *Fisse v. Einstein*, 5 Mo. App. 78, the court said: "The liability of a surety is said to be *strictissimi juris*, that is, the obligation of

a surety must not be extended to any other subject, to any other person, or to any other period of time, than is expressed or necessarily included in it. This is what is meant by strict construction of a contract of suretyship, *non extenditur de re ad rem, de persona ad personam, de tempore ad tempus*. The contract, however, is subject to the common-sense rules of interpretation which govern any commercial instrument. No surety is to be bound beyond the extent of the engagement which shall appear, from the expression of the security and the nature of the transaction, to have been in his contemplation at the time of entering into it. But to this extent the surety is bound. The intent or latitude of the contract of suretyship is to be ascertained by a fair and liberal construction of the instrument in favor of the parties, and then the case must be brought strictly within the terms of the guaranty, and the liability of the surety cannot be extended by implication. But one giving a guaranty shall be bound to the full extent of what appears to have been his engagement; and, for this purpose, it is said, the words of the guaranty are to be taken as strongly against him as the words will admit."

In *Shannon v. Dodge*, 18 Col. 169, the court, after remarking that the doctrine that the contract of a surety is *strictissimi juris* is liable to abuse in its application, went on to say: "Considering the situation of the obligee in an appeal bond, it would seem that his rights should be regarded equally with those of the surety. An appeal bond may be executed and approved, and thus accepted for the judgment creditor without his consent or knowledge, and thereby the enforcement of his judgment is stayed. It is the act of the surety which enables the judgment debtor to accomplish this result. The surety having thus prejudiced the judgment creditor, and having thus obtained for his principal, the judgment debtor, the benefit of an appeal, should not, upon the breach of the condition of the bond, be allowed to escape liability except for the most substantial reason." The general doctrine here laid down that, because an act done without the consent of the obligee has the effect of delaying the execution of his judgment, only "the most substantial reason" should be adequate to release the surety, is, we think, opposed to the weight of authority, and cannot be sustained without resorting to the hypothesis that the fact of the bonds being given and accepted without the consent of the obligee distinguishes this contract of suretyship from others. Such a contention we believe to be untenable, for it can scarcely be argued with any plausibility that a security which satisfies statutory requirements, and which must pass the scrutiny of a disinterested official, is likely on the average to be less satisfactory than one which is approved by the appellee himself. If there are no grounds upon which to base a general presumption that the obligees in appeal bonds occupy a less favored position than the obligees in other bonds, it is clear that the liability of the obligors in appeal bonds is properly determined by the same rules as the liability of obligors in other bonds. At the same time it must be admitted that many courts have shown, as will appear in the following sections, a more or less strong tendency to gauge the responsibility of sureties in appeal bonds by a somewhat different standard from the one universally admitted to be applicable to other contracts of suretyship. This tendency is the source of nearly, if not all, the inconsistency exhibited by the authorities. It should be noticed, however, that, in the case last cited, the court laid down a broader rule than was required for the determination of the point under discussion, viz: whether the sureties should be discharged by the taking of a second appeal. It will be seen below that there is ample

authority for the doctrine that this does not discharge them, and that the other courts which have made this ruling have not felt themselves obliged to apply any peculiar principles of construction to this contract of suretyship: See sec. 5 (d), *post*, p. 707.

2. DEFECTIVE EXECUTION OF BOND—WHEN SURETY NOT DISCHARGED BY. The principle is well established that if the character and extent of the surety's liability are ascertainable from an inspection of the whole instrument, no merely technical defects will be allowed to stand in the way of its enforcement. Thus, a bond executed by the surety alone is valid, because the liability of the principal is the same whether he signs it or not: *Harrison v. Bank of Kentucky*, 3 J. J. Marsh. 375; *Thom v. Savage*, 1 Blackf. 11; *Curtis v. Richards*, 9 Cal. 33; *Tissot v. Darling*, 9 Cal. 278; *Murdock v. Brooks*, 38 Cal. 604. Nor will the omission of the names of sureties in the introductory part of the bond affect its validity where they each sign and seal it: *Babbitt v. Finn*, 101 U. S. 7. Nor is a bond on an appeal from a judgment against two persons invalid by reason of the fact that it was signed by one only of the judgment defendants: *Raisback v. Greve*, 58 Ind. 72. Nor is it essential to express the consideration, the statute of frauds not being applicable to such instruments: *Doolittle v. Dininny*, 31 N. Y. 350; *Thompson v. Blanchard*, 3 N. Y. 335.

A fortiori must informalities be no reason for releasing a surety when they are the consequence of an agreement between the parties themselves; as when the statute requires the sureties in the bond to be approved by the court, and others are substituted by mutual consent: *Jones v. Droneberger*, 23 Ind. 74; *Easter v. Acklemire*, 81 Ind. 163; *Buchanan v. Milligan*, 125 Ind. 332; *Smock v. Harrison*, 74 Ind. 348.

VERBAL DIVERGENCIES FROM THE STATUTORY FORMS OF BONDS—EFFECT OF.—The general principle is, that if the condition of an appeal bond substantially covers the provisions of the statute, and secures to the respondent all that it was the object of the legislature to provide for his benefit in such cases, the instrument is sufficient, although it does not follow the exact words of the statute: *Riley v. Mitchell*, 38 Minn. 9; *Pray v. Wasdell*, 146 Mass. 324; *Kasson v. Estate of Bocker*, 47 Wis. 79; *Doolittle v. Dininny*, 31 N. Y. 350; *Martin v. Campbell*, 120 Mass. 126; *Creighton v. Harden*, 10 Ohio St. 579; *Bentley v. Dorcas*, 11 Ohio St. 398; *Whitehead v. Thorp*, 22 Iowa, 425. Nor is it any defense to an action on an appeal bond, that the security ought to have been taken in the form of a recognizance, provided the liability incurred by the bond is no greater than that which would have been incurred by the statutory recognizance: *Granger v. Parker*, 142 Mass. 186. The basis of those decisions is that the agreement of the surety is supported by a consideration sufficient to sustain it, even though the precise phraseology of the statute is not employed. That consideration is generally said to be the prejudice received by the appellee owing to the stay of the execution of the judgment: *Mix v. People*, 86 Ill. 329; *Smith v. Whitaker*, 11 Ill. 417; *Arnott v. Friel*, 50 Ill. 174; *George v. Beschoff*, 68 Ill. 236; *Jones v. Droneberger*, 23 Ind. 74; *Sturgis v. Rogers*, 26 Ind. 1; *Burt v. Hoettinger*, 28 Ind. 214; *Ham v. Greve*, 41 Ind. 531; *Hays v. Wilstach*, 101 Ind. 100; *Buchanan v. Milligan*, 125 Ind. 332; *Murdock v. Brooks*, 38 Cal. 596; *Parrott v. Kane*, Montana Supr. Court, June 1894. The expenses incurred by the appellee in defending the appeal may also be regarded as a sufficient consideration to sustain the bond: *Meserve v. Clark*, 115 Ill. 580. Or the contract may be viewed from the side of the appellant, and the consideration found in the benefit which he receives from the privilege of having the decision of

the lower court reviewed: *Shove v. Pendry*, 93 Ala. 248; *Adams v. Thompson*, 18 Neb. 541. Of course, if the variations in the bond operate in favor of the sureties, the reasons for not discharging them are still stronger: *Shaw v. McIntier*, 5 Allen, 423. The sole limitation to the rule that the sureties are bound by a bond which does not follow the language of the statute is, that it shall contain nothing in conflict with the statute, and shall not be otherwise illegal: *Pray v. Wadell*, 146 Mass. 324; *Mix v. People*, 86 Ill. 330.

When the phraseology is not that prescribed by the statute the only essential requisite is that it shall express the intent of the parties with sufficient clearness to enable the court to understand its meaning: *McElroy v. Mumford*, 128 N. Y. 303, where it was held to be enough if the judgment described could be identified. Thus, the following variations from the statutory form have been held to be immaterial as respects the liability of the sureties: The substitution of "or" for "and" in a statutory condition "to prosecute the appeal with effect, and perform the judgment": *Robinson v. Brinson*, 20 Tex. 438; the insertion of an incorrect date, where such insertion was not misleading: *Pray v. Wadell*, 146 Mass. 324; the substitution of the phrase "abide by the judgment," for "will pay the amount unsatisfied": *McMinn v. Patton*, 92 N. C. 371; the substitution of the words "prosecute his appeal," for "enter his appeal": *State v. Boies*, 41 Me. 345; the insertion of the words "in case they shall fail to obtain a reversal of the decision," after a statutory clause "pay all damages and costs that may be awarded against the appellants": *Kasson v. Estate of Bocker*, 47 Wis. 79; the insertion of the words "on said appeal" in such a position, that the effect is merely to convey a meaning which would have been deduced in any case: *Doolittle v. Dininny*, 31 N. Y. 350. Similarly, if words are inserted in any undertaking on appeal which are repugnant to its intent, and the instrument is otherwise complete, they may be rejected: *Oakley v. Van Noppen*, 100 N. C. 287.

On the other hand the surety's liability cannot be increased by the insertion of a condition which the judge had no authority to prescribe: *Kountze v. Omaha Hotel Co.*, 107 U. S. 378. Nor can the surety be held beyond the plain meaning of the instrument, although the probability is that some words have been omitted through the mistake of the scrivener: *Henrie v. Buck*, 39 Kan. 381, where the effect of the omission was to render the surety liable in a manner in which he could not have been made liable by any judgment in the proceedings in question, and he was therefore held to be discharged. Nor can a surety be held liable for the failure of the principal to prosecute an appeal "with effect," where the bond is merely that he shall "prosecute" such appeal: *Albertson v. McGee*, 7 Yerg. 106.

If the language of the bond is of doubtful meaning the court will sometimes resort to a consideration of the surrounding circumstances for the purpose of ascertaining the intention of the parties: *Shreffler v. Nadelloffer*, 133 Ill. 536; 23 Am. St. Rep. 626. There the draftsman, instead of drawing two bonds, one to serve as an appeal bond and the other as an injunction bond, took a blank appeal bond, and endeavored, by inserting a clause providing for the payment of the damages growing out of the continuance of the injunction, to make it serve both the purposes of an appeal and an injunction bond. It was thus uncertain whether the undertaking was to pay all damages growing out of the continuance of the injunction, in case the decree was affirmed by the appellate court, or merely to pay all such damages as should be awarded against the obligors by the judgment of that court.

The court held the former object to be the one contemplated by the parties, both for the reason that as the appellate court had no jurisdiction to render judgment for damages, the condition, if interpreted as importing an obligation to pay only such damages as should be adjudged by that court, would become senseless and nugatory, and also for the reason that the inference to be drawn from the ordinary procedure in such cases pointed to the same conclusion. The intention of the parties being apparently to give the bond for this purpose, and the instrument being equally susceptible of two interpretations, one of which was consistent with, and accomplished that intention, such interpretation must be deemed the true one. The undertaking, therefore, to pay the appellee his damages, upon the sole condition that the decree should be affirmed by the appellate court, must necessarily be held to be within the strict terms of the bond as the obligors made it, and not an obligation imported into it by implication or construction.

In some instances the language of the bond becomes immaterial, for the reason that the provisions of the statute are peremptory, and the liability of the sureties is necessarily defined and limited thereby. Thus, if the statute declares that the bond shall cover rents accruing between the stay of execution of a judgment in an action for the recovery of real property, the mere fact that the bond does not in express terms make the sureties liable for those rents is of no consequence: *Stults v. Zahn*, 117 Ind. 297. So, too, if no appeal is allowed from a default judgment in a justice's court, without first moving to set aside the default, a bond given for such appeal is void, and no judgment can be rendered thereon against the surety or his principal for costs: *Smith v. St. Louis etc. Ry. Co.*, 53 Mo. 338. And it is held in the same state, that recognizance, on appeals from justices' courts must comply strictly with the statutory requirements, and, failing in that, cannot be supported as voluntary common-law bonds: *Adams v. Wilson*, 10 Mo. 341; *Garnet v. Rodgers*, 52 Mo. 145; *Moore v. Damon*, 4 Mo. App. 111. In all these cases recovery on the recognizance was denied, where it was taken after the time fixed by law.

4. PROSECUTING WITH EFFECT, MEANING OF.—A very general provision in appeal bonds is that the appeal shall be "prosecuted with effect," and the construction placed upon this phrase by the bulk of authorities is that the suit shall be prosecuted successfully to a final judgment: *Wood v. Thomas*, 5 Blackf. 553; *Gordon v. Third Nat. Bank*, 56 Fed. Rep. 790; *Karthaus v. Owings*, 6 Harr. & J. 434; *Champomier v. Washington*, 2 La. Ann. 1013; *Robinson v. Brinson*, 20 Tex. 439; *Trent v. Rhomberg*, 66 Tex. 249; *Perrean v. Bevan*, 5 Barn. & C. 284 (replevin bond). Thus an appeal from a justice's court is prosecuted with effect, if it is prosecuted to a nonsuit: *Hobart v. Hilliard*, 11 Pick. 143. But a more restricted meaning is assigned to the phrase in other cases. Thus, in *Riley v. Mitchell*, 38 Minn. 9, it is said to be equivalent to "prosecute with due diligence to a final determination," and in *Kasson v. Estate of Brocker*, 47 Wis. 79, to employ a diligent prosecution without fraud or unnecessary delay, and the interpretation, "successful issue," is expressly repudiated. So, also, it was said in *People v. Richmond*, 57 Mich. 399, that a bond given on appeal from a justice's court in a criminal case, and requiring the accused to prosecute his appeal with effect, merely contemplates a prosecution in the usual way of trial and verdict.

5. WHAT JUDGMENT THE SURETIES BIND THEMSELVES TO SATISFY.—(a) *Question Decided by Intention of Parties.*—The principle that the surety is entitled to stand upon the strict terms of his contract has been largely discussed in cases in which it has been necessary to determine what judgment

be covered by the bond. Sometimes the presumed intention of the parties will furnish a sufficient solution of the question. Thus the court will presume that they did not intend to go through an idle ceremony in executing the instrument, and on this principle it has been held that an undertaking given in the form prescribed for the purpose of staying execution on a money judgment will stand as a valid security, where the actual judgment is for a chattel: *McElroy v. Mumford*, 128 N. Y. 303. Compare *Goodwin v. Buntz*, 102 N. Y. 224; *Shreffler v. Nadelhoffer*, 133 Ill. 536; 23 Am. St. Rep. 626.

(b) *Final Decision the One Contemplated.*—In the absence of the other considerations it is obvious, on general principles, that it must be the final decision determining the rights of the parties which must be deemed to have been within the contemplation of the sureties, and they are therefore not discharged because the judgment was first reversed, and then, upon a rehearing, affirmed: *Pearl v. Wellman*, 11 Ill. 352. So, too, the “final decree” in a cause which has been appealed from a federal circuit court to the supreme court of the United States, and affirmed there, is the decree rendered by the circuit court in obedience to the mandate of the supreme court after the cause has been returned from the latter tribunal: *Jordan v. Agawam Woollen Co.*, 106 Mass. 571. If, on the other hand, a party appeals from the judgment and from an order denying a motion for a new trial, and the bond recites both appeals, and contains a promise to pay within thirty days after filing the *remittitur*, if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed,” the promise relates to the appeal from the judgment, and no recovery can be had on the bond, unless it is shown that the judgment has been disposed of in one of the ways specified, and that the thirty days have elapsed since the filing of the *remittitur*: *McCallion v. Hibernia Sav. & Loan Soc.*, 83 Cal. 571.

(c) *Rule Where Particular Court Is Specified.*—If the bond is for the payment of the judgment in one particular court, the principle of strict construction of the contract is controlling, and the surety is released if the judgment is actually rendered in a different court: *Myres v. Parker*, 6 Ohio St. 501; *Smith v. Huesman*, 30 Ohio St. 662; *Planters' Bank v. Hudgins*, 84 Ga. 106; *Lockwood v. Saffold*, 1 Ga. 72. A similar construction of the contract is made if the court of a particular county is mentioned, and judgment is rendered in another county, though the bond, in the absence of such special limitation, would be deemed to have been executed with reference to the law allowing changes of venue: *Sharp v. Bedell*, 10 Ill. 88.

(d) *Rule Where a Second Appeal Is Taken.*—A bond in the usual form is always construed as covering the final determination in the court of last resort to which the parties may carry it by appeal, and the liability of the sureties does not cease because an intermediate court of appeal has rendered a decision in favor of their principal: *Humerton v. Hay*, 65 N. Y. 380; *Smith v. Crouse*, 24 Barb. 433; *Gardner v. Barney*, 24 How. Pr. 467; *Robinson v. Plimpton*, 25 N. Y. 484; *Doolittle v. Dininny*, 31 N. Y. 350; *Dolby v. Jones*, 2 Dev. 109; *Shannon v. Dodge*, 18 Col. 164; *Chester v. Broderick*, 131 N. Y. 549; *Bubbitt v. Finn*, 101 U. S. 7. The same doctrine prevails where a judgment is first reversed by the supreme court of a state, and afterwards affirmed in obedience to a mandate from the supreme court of the United States: *Crane v. Weymouth*, 54 Cal. 476. On the other hand it is held that if the undertaking is expressly limited to the intermediate court, it cannot be construed as covering a second appeal: *Justices etc. v. Selman*, 6 Ga. 440; *Winston v. Rives*, 4 Stew. & P. 269; *Hofsinger v. Hartnett*, 84 Mo. 549, the court, in the latter case, distinguishing the effect of the bond before

it from those drawn in general terms. Three of the judges thought that the ruling should have been different if the court of last resort had sent a mandate to the intermediate court directing it to enter a judgment in favor of the appellee, and the mandate had been obeyed. This position we think wholly untenable, for the contract of the surety is limited to the judgment of the intermediate court, on the simple and intelligible principle that a person may be willing to make himself answerable during the period which may elapse up to the time the first appeal is concluded, and very unwilling to extend his liability any farther. His rights depend, in such a case, upon something more than merely technical reasons, and the subtle distinction drawn by these judges would saddle him with a liability quite different from that which it is reasonable to suppose him to have contemplated. In the recent case of *Schuster v. Weiss*, 114 Mo. 158, the court applied the doctrine of *Hofsinger v. Hartnett*, 84 Mo. 549, to a case in which the bond covered appeals both to the intermediate and the final court, and before either appeal had been heard the legislature passed an act providing that the class of cases to which this one belonged were to be taken direct to the supreme court. Under these circumstances the court (two judges dissenting) held the sureties to be released, on the grounds that the act had imported new conditions into their contract, inasmuch as, owing to the impossibility of testing the case in the intermediate court, they had lost the chance of being exonerated by their principal's election to satisfy the judgment at that stage of the proceedings, and of procuring contribution from the sureties on the second bond, which it would have been necessary to give if a further appeal was taken.

6. DISMISSAL OF APPEAL EQUIVALENT TO AFFIRMANCE OF JUDGMENT.—The general rule is that the dismissal of an appeal operates as an affirmance of the judgment in the lower court, and renders the sureties on the appeal bond liable for the amount of that judgment: *Shannon v. Dodge*, 18 Col. 164; *McConnel v. Swailes*, 2 Scam. 571; *Coon v. McCormick*, 69 Iowa, 539; *Pass v. Payne*, 63 Miss. 239; *Harrison v. Bank of Kentucky*, 3 J. J. Marsh. 375; *Gudner v. Kilpatrick*, 14 Neb. 347; *Stults v. Zahn*, 117 Ind. 297. The effect is the same, whether the appeal is dismissed on the motion of the appellant: *Reeves v. Andrews*, 7 Ind. 207; or of the respondent, in pursuance of an agreement between the parties to the appeal: *Chase v. Beraud*, 29 Cal. 138 (citing several previous rulings by the same court); or by the action of the court for noncompliance with some statutory provision, as the failure to take the appeal within the prescribed period: *Adams v. Thompson*, 18 Neb. 541; *Wood v. Thomas*, 5 Blackf. 553; or to file a transcript of the record within the time appointed by law: *Thalheimer v. Crow*, 13 Col. 397; *Ellis v. Hall*, 23 Cal. 161. It is also held that the justification forms no part of the sureties' contract, and that their liability still exists, though the appeal was dismissed on account of their failure to justify, after an exception has been made to their sufficiency: *People v. Shirley*, 18 Cal. 121; *Davis v. Sturgis*, 1 Ind. 213; *Moffat v. Greenwalt*, 90 Cal. 368, citing *Manning v. Gould*, 47 N. Y. Sup. Ct. 387; *McSpedon v. Baker*, 5 Daly, 30; *Murdock v. Brooks*, 38 Cal. 598. The effect of providing that such a failure to justify has the effect of placing the proceedings on appeal in the same position as if no bond had been given does not mean that the appeal is in such a case entirely vacated, but that the respondent has the right to move that it should be dismissed: *Moffat v. Greenwalt*, 90 Cal. 368. Nor can the sureties excuse themselves on the ground that, if the appellant failed to enter the appeal, the statute gives the appellee the privilege of doing so for the purpose of having the judg-

ment affirmed, and that the appellee has omitted to avail himself of this privilege: *Loddell v. Lake*, 32 Conn. 16.

It has been held that if the dismissal of the appeal is due to the fact that the court has no jurisdiction, or that there has been a failure or omission or defect in matters antecedent to the appeal, the appellee cannot recover on the bond: *Gregory v. Obrian*, 13 N. J. L. 11, where the affidavit necessary in taking appeals from a justice's court was insufficient. A similar ruling has been made as to those cases in which both parties neglect to take such steps as are necessary to perfect the appeal, the consequence being that it never has any existence, and the parties are left to enforce the judgment as if no appeal had ever been taken: *Gimperling v. Hanes*, 40 Ohio St. 114. So, also, a bond which is given to secure a statutory privilege of appeal, and has not that effect, is without consideration, and void: *Powers v. Chabot*, 93 Cal. 266.

On the other hand, there is a line of cases in which the principle that the sureties are estopped by the recitals in their bond has been applied to hold the sureties to their undertaking, although the appeal is void, as where the case was one in which no appeal lay to the court in which it was finally dismissed: *Love v. Rockwell*, 1 Wis. 382; *Gudtner v. Kilpatrick*, 14 Neb. 347. So, too, although the bond is not in conformity with the statute, and the appellee might have disregarded it, the surety is, nevertheless, bound by the recital that the appeal has been taken: *Meserve v. Clark*, 115 Ill. 580. Nor can the sureties raise the objection in the appellate court that the appeal was premature by reason of its being taken before the actual entry of judgment, especially after the appellant has had the benefit of the stay-bond for two years, and, after the appeal has been argued by counsel, the *remittitur* has been sent to the lower court, and read in evidence on the trial of the action against them: *Parrott v. Kane*, Montana Sup. Ct., January, 1894.

7. REVERSAL OF JUDGMENT, EFFECT OF.—On general principles it is obvious that if the entire judgment of the lower court is reversed, no action will lie upon the bond: *Chase v. Ries*, 10 Cal. 518. If there are several defendants, and the judgment against a portion of them is reversed, the prevailing doctrine is that the sureties are still liable on their bond: *Seacord v. Morgan*, 3 Keyes, 636; *Gilpin v. Hord*, 85 Ky. 213; *Bridgford v. Fogg*, Ky. Ct. of App., Nov. 1890; *Hood v. Mathis*, 21 Mo. 312; *Culver v. Leovy*, 27 La. Ann. 58; *Alber v. Froehlich*, 39 Ohio St. 245, overruling *Lang v. Pike*, 27 Ohio St. 498; *Bentley v. Dorcas*, 11 Ohio St. 398. The rationale of these decisions is thus explained in *Seacord v. Morgan*, 3 Keyes, 636, where the court, after admitting the soundness of the general principle that an equitable construction of the contract cannot be resorted to for the purpose of charging the sureties, proceeded as follows: "But if the case is within the letter of their contract, they are liable, unless there is something in the spirit or intention of the instrument, or of the law under which it is taken, which exonerates them. The object of the undertaking is to procure an absolute stay of execution and of all proceedings on the judgment, and such is its effect. The motive of requiring the undertaking was to secure to the plaintiff the fruits of the recovery, in case it should be determined that the allegations of error were unfounded. As the plaintiff is, by the stay of execution, deprived of the immediate resort to the property of the judgment debtor, which the law would otherwise give him, and as his title, to the amount adjudged in his favor, is *prima facie* established, it was the policy of the law that he should have security to indemnify him against the possible contingency of the delay. The law assumes the judgment to be such presumptive

evidence of his right that it will not subject him to the hazard arising from the delay of further litigation, without an indemnity against any loss which he might thereby incur. If it should be decided that, in order to hold the sureties, the judgment should be affirmed in all its parts without variation or modification, the provisions for security would be illusory in a great variety of cases which may be supposed." In this case the court laid stress upon the fact that the judgment was against each of the defendants severally, and seemed to incline to the view that a different doctrine would be applicable if the judgment had been a joint one. This distinction is not recognized in *Gilpin v. Hord*, 85 Ky. 213, and *Culver v. Leovy*, 27 La. Ann. 58, and seems to us to have no sufficient foundation. It is true that the sureties are, in the case of the partial reversal of a joint judgment, prejudiced by being deprived of their remedy against the principal in favor of whom the appellate court has rendered its decision, but as this result follows where the judgment is several also, this cannot be a valid reason for discharging the sureties in the one instance and holding them in the other. It surely involves no strained construction of the contract to say that an obligor on such a bond is to be charged with the knowledge that the partial reversal of a joint judgment is just as much one of the possible results of taking an appeal as the partial reversal of a several judgment, and to require him to stipulate for a limited liability whenever he desires to insist on it. If the bond covers the whole judgment, only the most technical reasons can be adduced for the theory that the form in which that judgment is rendered should have any material effect upon the ultimate liability of the sureties.

8. CHANGE OF PARTIES AFTER APPEAL TAKEN, EFFECT OF.—Some early Tennessee decisions countenance the doctrine that a change in the parties to an appeal will discharge the sureties, but we think the conclusion of the principal case is amply sustained by the reason that "the law permitting the substitution of parties in case of the transfer of interest must have been known to the surety in the appeal undertaking when he became a surety, and he must be held to have signed subject to such contingency." The doctrine as to such cases is thus placed upon a ground analogous to that which we have, in the preceding section, suggested to be the most satisfactory one to support the rule that the surety is not released from liability upon the partial reversal of a joint judgment, viz., that such a result must be taken to have been within his contemplation when he assumed the responsibility of executing the bond. Even in Tennessee it has been held that the death of the principal on the bond will not discharge the sureties: *Butterworth v. Brown*, 7 Yerg. 467 (compare *Legate v. Marr*, 8 Blackf. 404); though in this case it is clear that the surety might be really prejudiced by the fact that the further prosecution of the appeal is thus placed in the hands of persons in whom he may have no confidence whatever.

9. FRAUD OR MISTAKE, LIABILITY OF SURETY, HOW FAR AFFECTED BY. That the surety is discharged if the conduct of the appellate proceedings is influenced by any fraudulent or collusive understanding between the principal and the appellee, is a doctrine in harmony with general principles, and it is assumed to be correct in the principal case, and some of those therein cited. On the other hand, it is held that the fact that a person was induced by fraud to become a surety does not affect the right of action of a conusee who was not a party to the fraud: *Martin v. Campbell*, 120 Mass. 126.

The mistake of the surety alone as to the legal effect of the bond owing to his taking the advice of the justice of the peace from whom the appeal was taken, and neglecting to read the instrument, is not a reason for relieving

him of his liability: *McMinn v. Patton*, 92 N. C. 371. But a mutual mistake of the parties as to the purpose of the undertaking will be a ground for reforming the bond so as to diminish the liability of the surety to the amount for which he intended to make himself answerable: *Barnett v. Nicholson*, 86 N. C. 728.

10. **LEGISLATION SUBSEQUENT TO EXECUTION OF BOND, EFFECT OF.**—The general principle that the liabilities of contracting parties cannot be enlarged by any legislative enactments which have come into force after the contract was entered into has been applied in several cases to the contract of suretyship on an appeal bond: *Hamilton v. Averill*, 11 Wend. 622; *Steen v. Finley*, 25 Miss. 535; *Woodson v. Johns*, 3 Munf. 230. But such enactments cannot be given the effect of absolving the sureties altogether from their undertaking: *Horner v. Lyman*, 4 Keyes, 237. There the legislature had provided that upon the affirmance of a judgment the court of appeals might at its discretion, award ten per cent damages for the delay. The lower court, in entering judgment against the sureties, inserted a clause allowing a recovery in accordance with this statute, and the defendants claimed to be exonerated by this act of the plaintiffs, in thus procuring the penalty to be included in the judgment. The court, however, disposed of this contention in the following manner:

“The insertion of the ten per cent damages did not affect the obligation or contract of the sureties in these undertakings. It did not add an iota to their responsibility or increase it in any respect. It was an act outside the contract and independent of it. The judgment clearly embraced damages which the party was not entitled to recover; but it made no change in the legal relations of the parties so far as the undertaking is concerned, and did not extend its scope. As has already been shown, this law did not operate retrospectively, and hence the undertaking did not embrace the ten per cent damages, and adding them to the judgment erroneously would not enlarge them. These damages should not have been allowed, and, having been inserted, cannot affect the obligation of the sureties.”

11. **DISCHARGE OF JUDGMENT DEBTOR IN BANKRUPTCY, EFFECT OF.**—Where the surety binds himself only for the payment of damages for which judgment may be entered, a discharge of the principal under the bankruptcy laws of the United States discharges the surety, as the effect is to terminate the case pending in the state court: *Odell v. Wootten*, 38 Ga. 224. This very strict construction of the bankruptcy laws, however, is not adopted by every court. Thus it was held in *Fisse v. Einstein*, 5 Mo. App. 78, that as the object of taking security on appeal is to guard against the risk of the judgment debtor's insolvency, it would be highly anomalous that his discharge in bankruptcy should absolve the sureties. The latter doctrine seems the more conformable to general principles, and it is supported to some extent by *Southcote v. Braithwaite*, 1 Term Rep. 624, where it was held that the bail in error were not entitled to relief, though the principal becomes a bankrupt pending the appeal. The reason given, however, was the peculiarly technical one that such bail are not entitled to surrender the body of their principal, and the case therefore has ceased to be in point, since the abolition of imprisonment for debt has reduced the sureties to the position of mere obligors for the payment of the judgment.

12. **ACTS OF PARTIES TO APPEAL, LIABILITY OF SURETY HOW FAR AFFECTED BY.**—(a) *Agreements Between the Parties, Surety, Whether Released by.* Conformably to the usual principles governing the liability of a surety, it

has been held that if, by an agreement entered into upon sufficient consideration, the appellant and appellee stipulate for mutual advantages, without the sureties' consent, the latter are thereby discharged: *Johnson v. Flint*, 34 Ala. 673; *Boynton v. Phelps*, 52 Ill. 210. If the consideration is not sufficient, and the agreement therefore not binding, the sureties are not discharged, as where the creditor promised the judgment debtor indulgence if he would pay a part of the judgment: *Sharp v. Fagan*, 3 Sneed, 541.

It is also held that the sureties are not discharged by a compromise between the appellant and appellee by which the creditor recovers judgment against the principal and the sureties with stay of execution for six months: *Ammons v. Whitehead*, 31 Miss. 99 (see the extract in the principal case). Nor are the sureties discharged because the plaintiff in a case appealed to the circuit court took a voluntary nonsuit, which was afterwards set aside, without the consent of the sureties, after which the plaintiff had judgment: *Bailey v. Rosenthal*, 56 Mo. 385; the court saying that "the sureties on an appeal bond are not parties to the suit in the sense that they must be consulted in regard to any step taken in the proceedings."

(b) *Mere Delay Will Not Discharge the Surety*, as where the appellee does not take the earliest possible steps to have the judgment affirmed: *Pearl v. Wellman*, 11 Ill. 352; *Railsback v. Greve*, 58 Ind. 72.

(c) *The Release of a Security Will Discharge the Surety*, as where the creditor levies an execution on the judgment debtor's goods, and subsequently discharges it. The surety in such a case is *pro tanto* released from his liability, wholly released, if the goods were enough to have satisfied the judgment: *Cooper v. Wilcox*, 2 Dev. & B. Eq. 90; 32 Am. Dec. 695. So, also, where there is a second appeal taken, and a new undertaking given, the primary liability rests upon the sureties in this appeal, and their release by the judgment creditor discharges the sureties in the undertaking on the first appeal: *Hinckley v. Kreitz*, 58 N. Y. 583.

(d) *A Surety Is Not Discharged by Giving an Additional Security*, as where he replevies the execution on the original judgment, and gives replevin bonds: *Morrow v. Mason*, 7 J. J. Marsh. 370. For the application of this principle to cases where a second appeal is taken: See sec. 5 (d) *ante*.

13. **LIABILITY OF SURETY COMMENSURATE WITH THAT OF PRINCIPAL** From the nature of the contract it must be obvious that the right to recover against the sureties on an appeal bond cannot exist unless the plaintiff can recover against the principal also: *Sharon v. Sharon*, 84 Cal. 433. Hence no action is maintainable against them, unless the case is in such a condition that the plaintiff might have issued an execution against the judgment defendant, had he desired to do so: *Purnell v. Hancock*, 48 Cal. 452, where an order had been made directing a stay of execution until the plaintiff should have made an assignment of a certain judgment. Nor can the action be maintained, where a finding of fact has been made in the plaintiff's favor, but no judgment rendered thereon: *Brounly v. Daniels*, 23 Neb. 162. But it is no defense that, after the commencement of the action, an order staying a writ of restitution in the original action has been made, provided the liability of the judgment defendant has been finally fixed, and the writ has not been stayed on any grounds that affect the validity or integrity of the judgment, or the rights of the plaintiff, or the liabilities of the defendant: *Parrott v. Kane*, Montana Sup. Ct., Jan. 1894.

But this general rule is subject to some qualifications. Thus, in *Staley v. Howard*, 7 Mo. App. 377, it was held that a condition that the appellant "will comply with and perform the judgment so far as it may be affirmed"

is broken, if the judgment is not paid, although, owing to the defendant being a married woman, there could be no process against her directly. So also in *Texas Trunk Ry. Co. v. Jackson*, 85 Tex. 605, the court, while inclining to the view that a railroad company against whom a decree forfeiting its franchise has been issued may yet perfect an appeal, and execute an appeal bond, held that, supposing the company not to have that capacity, the sureties on a bond given in an appeal from a justice's court to the district court, in which the forfeiture is pronounced, have a right to prosecute error to the supreme court, and are therefore liable. In support of this position, the case of a surety's being bound, where a married woman or an infant is the principal, is referred to.

Another deduction from the general principle that the plaintiff cannot recover in an action against the sureties, so long as he cannot recover against the judgment defendant, is that any circumstance which operates as a discharge of the judgment is always a good defense in such an action, as payment of the judgment: *Stelle v. Lovejoy*, 125 Ill. 352; a levy upon sufficient personal property to satisfy the judgment: *Herrick v. Swartwout*, 72 Ill. 340; *First Nat. Bank v. Rogers*, 13 Minn. 407; 97 Am. Dec. 239; a tender of the amount of the judgment in United States legal tender notes, unless the judgment is expressly made payable in gold: *Sharp v. Miller*, 57 Cal. 415. But a tender made after the expiration of a period fixed by the lower court will not release the sureties, although the tender was actually made before that period had elapsed after the affirmation of the judgment on appeal: *Ross v. Swiggett*, 16 Ind. 433. Nor does the rule that a surety is discharged by a levy on personal property sufficient to satisfy the judgment apply where the levy is made on real estate, so long at least as the levy is undisposed of: *Herrick v. Swartwout*, 72 Ill. 340. Even in the former instance it is obvious that the surety is not discharged unless the levy is sufficient to satisfy the judgment, for the mere taking out an execution is not a waiver of the plaintiff's right of action on the bond: *Many v. Sizer*, 6 Gray, 141.

14. **LIABILITY OF SURETY, WHEN TERMINATED BY DEATH.**—Upon a joint undertaking running, "We . . . do hereby, pursuant to the statute, etc., undertake," the survivor is, on the principle of the strict construction of such contracts, held to be liable: *Wood v. Fisk*, 63 N. Y. 245; 20 Am. Rep. 528.

15. **PERFORMANCE OF ONE CONDITION IN BOND NO DEFENSE TO AN ACTION FOR BREACH OF ANOTHER.**—It is well settled that a suit for the breach of any material condition in the bond may be maintained: *Crane v. Andrews*, 10 Col. 265; *Philbrick v. Buxton*, 40 N. H. 384; *Trent v. Rhomberg*, 66 Tex. 249. It has even been held that where the bond is to prosecute the appeal with effect, and to pay costs and damages, the full payment of the latter will not prevent the recovery of nominal damages for a breach of the former condition: *George v. Bischoff*, 68 Ill. 236. Nor is a surety on a similar bond discharged because, owing to the plaintiff not succeeding in establishing his entire claim, the appeal has not been wholly without effect: *Co'ulla v. Goggan*, 77 Tex. 32. That a failure on the part of the appellant to prosecute the appeal with effect will raise a right of action on the bond, even if a condition to that effect is not contained therein, is held in *Garisk v. McKeerer*, 37 Ind. 484, the reason given being that the prosecution of the appeal with effect is a statutory requirement, which must be complied with in order to discharge the surety. (Compare section 3, *ante*, as to the effect of the statutory requirements being peremptory.)

16. **ENFORCEMENT OF APPEAL BONDS, PROCEEDINGS FOR.**—(a) *Summary Process.*—In most, if not all, the states, there is a provision for rendering summary judgment against all the obligors in appeal bonds, when the judgment is affirmed by the appellate court. Statutes including such a provision have been expressly held not to be unconstitutional: *Beall v. New Mexico*, 16 Wall. 539; *Davidson v. Farrell*, 8 Min. 258. The position of the surety, under such circumstances, is thus stated in *Chappes v. Thomas*, 5 Mich. 59: "This bond is, we think, to be read in all respects as if the whole of the statute in reference to the appeal, the bond, and the mode of entering up judgment upon it were recited at large in the bond. And, in this view, it becomes a direct judgment in the manner, and stands upon a principle analogous to that of a warrant of attorney. It is true the authority is here given to the court instead of one of its officers, as the attorney of the party, but this is a difference of form rather than of substance. The constitutional prohibition against 'depriving any person of his property without due process of law' was obviously intended only to protect persons from being deprived of their property without their assent, unless by due process of law. The constitution would become a very officious instrument if it sought to force its protection upon any man against his will." To the same effect see *White v. Prigmore*, 29 Ark. 208; *Meredith v. Santa Clara Mfg. Assn. of Baltimore*, 60 Cal. 617; *Shannon v. Dodge*, 18 Col. 164. Under statutes of this character it is held that summary judgment may be rendered, on motion, against the sureties, without notice: *Mowry v. Heney*, 86 Cal. 471; *Phelan v. Johnson*, 80 Iowa, 727; *Meredith v. Santa Clara Mfg. Assn. of Baltimore*, 60 Cal. 617. In other states the judgment may be rendered on motion, but notice must be given to the obligors, and an opportunity afforded them to make any defense which would have been available in an action on the bond: *Kiernan v. Cameron*, 66 Miss. 442. The liability of the sureties may be fixed by similar proceedings in the federal courts: *Smith v. Gaines*, 93 U. S. 341; *The Sydney*, 47 Fed. Rep. 260; *Gordon v. Third Nat. Bank*, 56 Fed. Rep. 790; *The Wanata*, 95 U. S. 600. Where the sureties, however, make themselves liable for damages, a summary judgment will not be rendered against them unless such damages can be ascertained without an issue and a trial: *Muzzy v. Tompkinson*, 2 Wash. 635.

The above statutes are not construed as having the effect of debarring the obligee from maintaining an independent action against the sureties: *Lobdell v. Lake*, 32 Conn. 16; *State v. Boies*, 41 Me. 344; *Tissot v. Darling*, 9 Cal. 278.

(b) *Who May Take Advantage of a Stay Bond.*—Where the judgment is entire, a stay bond operates to the benefit of all the plaintiffs who have a beneficial interest in the judgment: *Sturgis v. Rogers*, 26 Ind. 1.

(c) *Prerequisites of Suit.*—An action may be maintained on the bond without first issuing an execution against the principal's property: *Tissot v. Darling*, 9 Cal. 278; *Browner v. Davis*, 15 Cal. 11; *Parnell v. Hancock*, 48 Cal. 452; *Smith v. Ramsay*, 6 Serg. & R. 573; *Mix v. People*, 86 Ill. 329; *Babbitt v. Finn*, 101 U. S. 7.

(e) *Statute of Limitations, What Governs Actions on Appeal Bonds.*—Since the undertaking of a surety is not a collateral one, but an absolute covenant to pay the judgment appealed from, the time for bringing an action on such an undertaking is regulated not by that part of the statute of limitations which relates to actions on judgments, but by the part which relates to actions on sealed instruments for the payment of money: *Stelle v. Lovejoy*, 125 Ill. 352.

17. MEASURE OF RECOVERY ON APPEAL BONDS.—(a) *When Penalty Is Fixed*.—As in the case of other bonds, the recovery against a surety on an appeal bond is limited to the amount of the penalty, when that is a fixed sum: *Zeigler v. Henry*, 77 Mich. 480; *Allen v. Gruler*, 24 Ark. 271; *Graeter v. De Wolf*, 112 Ind. 1. In such a case the surety may be held liable, not only for the amount of the principal demand, but also for the costs of the suit and damages for the detention of the debt, provided the total does not exceed the penalty fixed: *Crane v. Andrews*, 10 Col. 265. But since the obligation of the sureties becomes mature when the judgment is rendered, they are in default from that time, and, during the continuance of that default, interest is due from them as in any other case where money is not paid when the creditor is entitled to it. It is no defense to a demand for such interest that its recovery would swell the amount of the judgment above the stipulated penalty: *Ives v. Merchants' Bank of Boston*, 12 How. 159; *The Wanata*, 95 U. S. 600; compare *Brainard v. Jones*, 18 N. Y. 85, a case of a replevin bond.

(b) *Where the Penalty Is Not Fixed*, the surety is in general liable for the amount of the judgment from which the appeal is taken, as well as for the damages and costs occasioned by the appeal: *Moore v. Gorin*, 2 Litt. 187; *Cutlett v. Brodie*, 9 Wheat. 553; *Jerome v. McCarter*, 21 Wall. 17; *Tarr v. Rosenstein*, 53 Fed. Rep. 112. Where the condition of the bond is, in substance, that the sureties shall pay the judgment recovered by the plaintiff, a decision of the court, upon a motion of the plaintiff, to have the costs taxed is not in any sense a judgment, within the meaning of the bond, so as to limit the amount recoverable to the payment of such costs alone: *Many v. Sizer*, 6 Gray, 141. Nor will the rule as to the strict construction of a surety's contract be applied so as to limit the recovery to the amount of the costs alone, where the instrument shows a clear intention to come under the more enlarged obligation to pay the entire judgment: *McElroy v. Mumford*, 128 N. Y. 303. Some times a similar construction will be placed on a bond, where the addition of the clause from which the liability is deduced would otherwise be meaningless: *Erickson v. Elder*, 34 Minn. 370.

If the terms of the bond render the sureties liable to pay the judgment, they are not entitled to a *pro rata* credit for the proceeds of the sale of the defendant's property on execution, but are responsible for the entire deficiency: *Ives v. Merchants' Bank of Boston*, 12 How. 159. To the same effect see *Sessions v. Pintard*, 18 How. 106.

Different rules, however, are applicable where the appeal is taken from a proceeding *in rem*. The most common instance of this is a foreclosure suit. The liability of a surety on such an appeal was discussed in *Supervisors v. Kennicott*, 103 U. S. 554, and *Kountze v. Omaha Hotel Co.*, 107 U. S. 378. In the latter case, after a review of the earlier rulings, it was held that the bond given in the federal courts "to answer all damages and costs" does not operate as a security for the amount of the original decree, nor for the interest accruing thereon pending the appeal; nor for the balance due after applying the proceeds of the mortgaged premises; nor for the rents and profits, or the use and detention of the property pending the appeal, but only for the costs of the appeal, and the deterioration or waste of the property, and perhaps burdens accruing upon it by nonpayment of taxes, and loss by fire, if it be not properly insured. A strong dissenting opinion, however, was filed by Miller, J., and concurred in by Field, J., who thought that the sureties should be held liable for "use and detention" pending the appeal, partly on the ground of the wording of the statute, and partly on the ground that the

grossest injustice would result in many cases if the defendant were allowed the use of the property after the foreclosure decree was rendered. In the state courts it is universally held the obligation of the sureties does not extend to the payment of the amount decreed to be paid out of the proceeds of the foreclosure sale: *Concordia Sav. & Aid Assn. v. Read*, 124 N. Y. 189; *Scott v. Marchant*, 88 Ind. 349; *Sumrall v. Reid*, 2 Dana, 65; *Wilson v. Glenn*, 77 Ind. 585; *Talbot v. Morton*, 5 Litt. 326.

Similarly, a chancery decree merely finding amount to be due, and subjecting certain securities to be sold for its satisfaction, is not a decree for the remainder of the debt after the securities are exhausted, nor can an execution be issued for the balance. This amount is not "condemnation money" within the meaning of a bond containing such a phrase: *Hamilton v. Jefferson*, 13 Ohio, 428, the court saying that it was substantially a proceeding *in rem*. Nor is a portion of a deficiency left on sale of the appellant's property to satisfy the decree within a condition "to pay, satisfy, or perform the decree or final order of the supreme court, and to pay all costs, in case the decree or order of the circuit court in chancery shall be affirmed: *Kennedy v. Nims*, 52 Mich. 153. On the other hand, where there was, in a suit on a chattel mortgage, a personal judgment, and also a decree for foreclosure against A and B, and a decree of foreclosure against A, B, and C, and C appealed, it was held that, as the effect of the appeal was to stay proceedings on the personal judgment, as well as the foreclosure sale, the surety was liable for whatever injury resulted to the plaintiff from the appeal, as the deterioration of the mortgaged property: *Hinkle v. Holmes*, 85 Ind. 405. Nor can the surety escape paying the amount of the original decree, if the proceeding *in rem* is merely ancillary to a proceeding *in personam*: *Graham v. Swigert*, 12 B. Mon. 522.

Similar principles are applicable, also, where the appeal is from a judgment or a decree for something else than the payment of money by the appellant. Thus, in an appeal to determine whether a decree of distribution is correct, the surety is not liable for the sums decreed to be paid to creditors:

Worth v. Smith, 5 B. Mon. 504; nor is a surety, on an appeal from an order denying a motion to quash an execution, on the ground that the judgment has been paid, liable for the amount of the original judgment: *Woulam v. Kelton*, 52 Ark. 444; nor, on the withdrawal of a claim interposed in execution, the case having been appealed from the justice's court, is the surety liable for the amount due on execution: *Bryan v. Simpson*, Georgia Sup. Ct., July, 1893.

(c) *What Costs Are Recoverable in a Suit on an Appeal Bond*.—In the absence of special provisions, the surety on a bond given for a first appeal is not liable for the costs of a further appeal to a higher court: *Babbitt v. Finn*, 101 U. S. 7; *Hinckley v. Kreitz*, 58 N. Y. 583. But see *Smith v. Crouse*, 24 Barb. 433. But a condition "to pay all costs," in case the decree is affirmed, covers costs taxed in the lower, as well as the appellate, court: *Daily v. Litchfield*, 11 Mich. 497; *Prosser v. Whitney*, 46 Mich. 407. A bond to secure the performance of the decree of the lower court does not cover costs taxed against him in that court, though a part of the decree is that he shall pay those costs: *Michie v. Ellair*, 60 Mich. 73. Under the Kansas code the "debts, costs, and damages for which the surety is to be liable, if an appeal from the justice's court is dismissed, are the debt and damages recovered by the appellee against the appellant in the justice's court, not merely the amount of the judgment for the costs rendered in the district court: *Fitzgerald v. Wellington*, 37 Kan. 460. On the other hand, where an appeal from

a justice's court is dismissed, the judgment below does not thereby become a part of the judgment of the appellate court, and on a condition that the surety will pay the judgment rendered in the appellate court, the plaintiff can recover no more than the amount of the judgment for costs in that court on the dismissal of the appeal. But, if there is also a condition to prosecute the appeal with effect, he may recover the amount of the judgment and costs below, upon showing that the principal has become insolvent between the taking of the appeal and its dismissal: *Ketsinger v. Reynolds*, 11 Ind. 545.

(d) *Interest, When Recoverable.*—This question has been already discussed, to some extent, in connection with the amount of the recovery where the penalty is fixed: See subd. (a) of this section. In the United States courts, where a personal judgment is appealed from, the "damages and costs" which the appellant is to answer for are the judgment, including interest as an incident thereto: *Cutlett v. Brodie*, 9 Wheat. 553. No recovery of interest, however, can be had where the judgment did not carry interest: *Louisville etc. R. R. Co. v. Sharp*, 91 Ky. 411.

(e) *Attorney Fees, When Recoverable.*—As a general rule the sureties are not liable for the fees of an attorney for services in resisting the appeal: *Noll v. Smith*, 66 Ind. 188; *Kellögg v. Howes*, 93 Cal. 586. But where the statute makes such fees a lien on the judgment, and the plaintiff releases the judgment by a compromise effected without his attorney's knowledge, the sureties may be held liable for his fees: *Johnson v. McMillan*, 13 Col. 423.

18. AMOUNT RECOVERABLE IN VARIOUS ACTIONS.—(a) *Actions Against Lessees.*—Where a lessee takes a new lease pending the appeal of an action for rent, a bond to pay "all rent due and become due" covers rent in both cases: *Pray v. Wadell*, 146 Mass. 324. But under the Massachusetts statute for the recovery of rent in a justice's court by an action of forcible entry and detainer, it is held that the damages are restricted in character, and an undertaking given on an appeal from such action, "to pay all rent then due and all intervening rents, damages, and costs" covers nothing but the rent at the rate stipulated by the parties and interest thereon: *Bartholomew v. Chapin*, 10 Met. 1, the court saying that, if other damages were claimed, the manner of enforcing such a claim must be by writ of entry which would open the inquiry in reference to damages in the fullest manner.

(b) *Actions for the Recovery of Land.*—In Indiana it is well settled that the sureties on an appeal bond given by a judgment defendant on appeal from a judgment for the possession of real estate are liable for the rental value of the real estate pending the appeal, to an amount not exceeding the penalty: *Opp v. Ward*, 125 Ind. 241; 21 Am. St. Rep. 220, citing several earlier cases. But the principle that the surety is entitled to stand upon the very terms of his bond may sometimes discharge him, as where the language employed was that he should pay "all rents, profits, damages, and costs that may be adjudged against him, and otherwise abide the judgment of the St. Louis court of appeals." It was held that, as no rents were adjudged against the appellant in the specified court, there was no breach on which recovery could be had. Such a bond, it was said, did not cover the rents adjudged in the justice's court from which the appeal had been carried up through an intermediate court: *Bauer v. Cabanne*, 105 Mo. 110. A statutory appeal bond given in an equity suit in a United States court to recover land does not include rent and mesne profits unless recovered in that suit: *Burgess v. Doble*, 149 Mass. 256. Whether mesne profits are recoverable may depend in some cases on the language of the bond. Recovery was denied where the conditions were that the "plaintiff in error

prosecute his appeal with effect, and if the judgment be affirmed, or the writ of error be discontinued or non-prossed, that he pay the debt, damages, and costs, adjudged or accrued upon such judgment, and all other damages and costs that may be awarded upon such writ of error," etc.: *Johnson v. Howell*, 134 Pa. St. 315, the court distinguishing the case from *Cahall v. Building Association*, 74 Ala. 539, where the undertaking was to "pay and satisfy all costs and such damages as the plaintiff may sustain by reason of the appeal." If the condition is "for the payment of mesne profits as well before as during the pendency of the writ of error," the recovery is not limited to the time during which it can be shown that they were received by the plaintiff in error: *Sherry v. State Bank of Indiana*, 6 Ind. 397. Sometimes the character of the proceedings is the controlling consideration. Thus, in *Carver v. Carver*, 115 Ind. 539, it was held that a bond on an appeal from a judgment declaring appellee's interest in an undivided portion of real estate, quieting title thereto, and awarding a certain sum as damages, does not cover mesne rents and profits of the appellee's interest in such real estate, the only proceeding stayed being the execution in the judgment for damages and costs. The court remarked that the judgment could not have been enforced so as to eject the defendant. To get possession a suit in partition was required, and the appeal was no obstacle to such a suit. The case was distinguished in this particular from *Opp v. Ten Eyck*, 99 Ind. 345, where nothing stood in the way of enforcing the judgment, and recovering possession of the land, except the appeal bond.

In a suit on a bond given on an appeal from a judgment in ejectment, the sureties cannot deduct the value of the improvements: *Sherry v. State Bank of Indiana*, 6 Ind. 397.

(c) *Appeals from Orders Dissolving Injunctions*.—Sureties on a bond on an appeal from an order dissolving an injunction, where the condition is to pay "all damages caused by wrongfully suing out said injunction," are not liable for damages sustained in consequence of the injunction being kept in force by the appeal: *Mix v. Singleton*, 86 Ill. 194.

19. PLEADING AND PRACTICE.—(a) *The Complaint in an Action on an Appeal Bond* need not allege that the plaintiff has sustained damage on account of the appeal: *McMinn v. Patton*, 92 N. C. 371; nor that the lower court had jurisdiction to render the judgment appealed from; nor that the undertaking had the effect of staying execution: *Murdock v. Brooks*, 38 Cal. 596. But it must either show that the bond has been executed according to the statute, or that such defect has been either expressly or by implication waived; also, that there was a consideration for its execution: *Ham v. Greer*, 41 Ind. 531. A complaint is sufficient when it sets out the bond and alleges affirmation of the judgment appealed from, and a breach of one of the conditions: *Thulheimer v. Crow*, 13 Col. 397. A complaint is not bad on demurrer which describes the judgment as against two persons, and the bond filed with the complaint, as part thereof, describes it as being against only one person. The defect in the bond may be shown without suggesting it in the complaint: *Railsback v. Greve*, 58 Ind. 72. So, also, an averment in a complaint, not tested by demurrer, "that said appeal bond operated as a *superedeas* in said cause, though it is, strictly speaking, a mere statement of a legal conclusion, should be regarded as warranting proof of such facts, if any, as would make the bond have that effect, and, after verdict, it will be presumed that such proof was given: *Smock v. Harrison*, 74 Ind. 348. So, also, an objection that the complaint does not show that the bond sued on was taken and approved as the bond of the defendants, must be taken by

demurrer in the lower court, and cannot be urged in the appellate court: *Herrick v. Swartwout*, 72 Ill. 341.

Answer, Requisites of.—Where an appeal was taken from the district court to the supreme court of a territory, and thence to the supreme court of the United States, the answer in an action on the bond taken on the first appeal must aver not only that the second appeal has been taken, but that it has been perfected and is still pending: *Gillette v. Bullard*, 20 Wall. 571.

(c) *Practice.*—In a suit on the bond, it is unnecessary to introduce a copy of the record of the judgment appealed from, when it is recited in the condition of the bond, since the plaintiff is estopped to deny the existence of the judgment: *Herrick v. Swartwout*, 72 Ill. 341. A surety after the entry of judgment in the supreme court cannot in another court enjoin its execution, on the ground that it was erroneously entered after dismissal. He must apply to the supreme court, and have the judgment set aside: *Phelan v. Johnson*, 80 Iowa, 727.

20. JUDGMENT AGAINST PRINCIPAL CONCLUSIVE AGAINST SURETIES, HOW FAR.—This subject is generally treated in the note to *Charles v. Hoskins*, 83 Am. Dec. 380. The ordinary rule that a judgment against a principal is conclusive against the sureties has been applied in actions on appeal bonds in *Oakley v. Van Noppen*, 100 N. C. 287; *McCormick v. Hubbell*, 4 Mont. 87; *Hathaway v. Davis*, 33 Cal. 170; *Murdock v. Brooks*, 38 Cal. 601; *Karthaus v. Owings*, 6 Har. & J. 134; *Babbitt v. Finn*, 101 U. S. 7; *Gordon v. Third Nat. Bank*, 58 Fed. Rep. 790; the usual limitation being also applicable, that the surety is only bound by the record as to facts necessarily determined by the judgment, which they have agreed to pay, and is at liberty to put in issue any question not necessarily determined—as, for instance, subsequent payment, and, probably, that the judgment was recovered for another's benefit: *Seymour v. Smith*, 114 N. Y. 481; 11 Am. St. Rep. 683. The validity of the judgment cannot be called in question in an action on the bond: *Sturgis v. Rogers*, 26 Ind. 1; nor can the sureties defend on the ground that the judgment appealed from was fraudulent and void: *Knight v. Waters*, 18 Iowa, 345; but they may impeach the judgment of affirmance on that ground: *Krall v. Libbey*, 53 Wis. 292. An allegation that the judgment is unjust is not sufficient to entitle the surety to have the judgment re-examined in equity, unless it also appears that, by collusion between the plaintiff and the defendant in the action at law, the judgment was suffered for the purpose of charging the surety, or unless there is some other ground averred on which such defendant could himself have procured relief in equity: *Piercy v. Piercy*, 1 Ired. Eq. 214.

A judgment not valid for any purpose cannot of course be adduced as evidence. Thus, where the effect of an appeal from the justice's court is to transfer the cause for the purposes of trial and final adjudication, a dismissal avoids all proceedings in the justice's court, and the judgment is not the measure of damages for breach of the bond given on appeal: *Reeves v. Andrews*, 7 Ind. 207.

The existence of the judgment itself cannot be denied by the sureties, as they are estopped by the recitals in their bond: *Mix v. People*, 86 Ill. 329; *Herrick v. Swartwout*, 72 Ill. 341; *George v. Bischoff*, 68 Ill. 236; *Thalheimer v. Crow*, 13 Col. 397; *Parrott v. Kane*, Montana Sup. Ct., Jan. 1894.

HENDERSON v. NOTT.

[36 NEBRASKA, 154.]

EXECUTIONS—LABORER WITHIN MEANING OF EXEMPTION STATUTE, WHO IS NOT.—One who contracts to manufacture brick at a fixed price per thousand, furnishing and paying all help, keeping the machinery in good order and feeding a team supplied by the other contracting party, is not a "laborer" within the meaning of a statute providing that no property of a debtor shall be exempt from levy and sale on execution or attachment for "clerks', laborers', or mechanics' wages."

Abbott and Caldwell, for the plaintiffs in error.

¹⁵⁴ NORVAL, J. The defendant in error commenced an action in the county court against the plaintiffs in error upon six different causes of action. The first cause of action alleged in the petition is on an account stated between the parties for work and labor performed by plaintiff for defendants amounting to \$106.28. The second cause of action is for three days' work at \$1.50 per day. The third count of the petition is in the sum of \$10 for work performed for defendants in moving a kiln of brick. The fourth count is for the sum of \$40 for services rendered in erecting for defendants a brick wall for a brick-kiln. The fifth cause ¹⁵⁵ of action is for a balance of \$5.75 alleged to be due plaintiff for providing feed, stabling, care, and attention for two horses belonging to defendants. The sixth count is to recover the sum of \$328 upon a written contract, of which the following is a copy:

"This agreement, made between C. P. Henderson and J. B. Henderson, partners under the firm name of C. P. Henderson & Bro., brickmakers of Phillips, Hamilton county, Nebraska, party of the first part, and Samuel Nott, now of the same county, party of the second part, to wit: Party of second part agrees to furnish and pay all help and make and burn good merchantable brick for three (\$3) per thousand; to keep all machinery in good repair; in case of breakage in any part of the machinery not to the fault of party of the second part, then the party of the first part to replace the same; the party of the first part to furnish one team of horses, and the party of the second part to feed and keep the same in good order. To furnish and keep machinery well oiled. It is also agreed that party of the first part is to furnish all coal on cars at Phillips to burn all brick made by party of the second part.

"Grand Island, July 22, '90.

C. P. HENDERSON.

"J. B. HENDERSON.

"SAMUEL NOTT.

"Witness: M. L. Dolan.

"J. T. Nott."

The defendants in their answer, after admitting certain of the allegations of the petition and denying others, pleaded a counterclaim against the plaintiff amounting to \$267.55. On the trial the county court found there was due on the first, second, third, and sixth causes of action from the defendants \$429.70; that nothing was due on the fourth and fifth causes of action; that there was due from plaintiff to defendants the sum of \$144.88; and judgment was rendered ¹⁵⁶ in favor of the plaintiff for \$288.82, the difference between said sums, as laborers' wages, together with cost of suit. The defendants below prosecuted error to the district court, the error complained of there, as well as here, being the rendition of a judgment for laborers' wages. The judgment of the county court was affirmed.

The evidence in the case was not preserved by a bill of exceptions. The only question therefore presented is whether, under the petition, Nott was entitled to a judgment for laborers' wages for the amount rendered. It will be perceived that the total amount claimed in the first three causes of action stated in the petition is only \$120.70, so that a portion of plaintiff's recovery must have been based upon his sixth cause of action. Under the contract set up in said count of the petition and copied above, was defendant in error entitled to a judgment for laborers' wages for the amount due thereunder? The argument of counsel for plaintiffs in error against the right of Nott to such a judgment is briefly this: That a wage laborer, in contemplation of the statute, is one who depends upon his daily labor for sustenance; that the mere fact that manual labor enters into and forms a part of the consideration of a contract does not of itself entitle the party to a wage laborer's judgment; that one who employs others and uses machinery to carry on the work, or contracts for undertakings which involve the employment of other persons, machinery, and materials, is not a wage laborer. The determination of the question involved in this case calls for a construction of section 531 of the Code of Civil Procedure, which declares that "nothing in this chapter shall be so construed as to exempt any property in this state from execution or attachment for clerks', laborers', or mechanics' wages, for money due and owing by any attorney at law for money or other valuable consideration received by said attorney for any person or persons," etc.

¹⁵⁷ Under the above provision no property of a debtor is

exempt from levy and sale on execution or attachment on a debt for the wages of a laborer, mechanic, or clerk. It is not claimed that the indebtedness to Nott under the contract already mentioned was for services performed by him for plaintiffs in error, either as a clerk or mechanic, but both the county and district courts ruled that the debt was for laborers' wages; so that if defendant in error is entitled to the benefit of the statute, it is because what was done by him in pursuance of the contract was as a laborer, in the sense contemplated by the above provision. The purpose of the legislature in enacting the section was to give protection to the classes mentioned therein. It was designed to furnish relief to the persons specifically enumerated in the collection of debts due them for their personal services, and not to those who contract and furnish the labor and services of others. Such a contractor is not a laborer within the meaning of the provision, nor is he entitled to its protection. Plaintiff below is not a laborer in the popular sense or the common understanding of that word. The term "laborer," in the sense of this statute, is one who is hired to do manual or menial labor for another, but it does not include every person who performs labor for compensation. The authorities fully sustain the proposition.

In *Brockway v. Innes*, 39 Mich. 47, 33 Am. Rep. 348, it was decided that an assistant civil engineer of a railroad company is not a "laborer within the meaning of a constitutional provision making stockholders of a corporation liable for labor debts of the corporation." And in *Jones v. Avery*, 50 Mich. 326, it was held that a traveling salesman, selling by sample, did not come within the meaning of the same constitutional provision. To the same effect is *Price v. Kirk*, 90 Pa. St. 47.

In *Wildner v. Ferguson*, 42 Minn. 112, 18 Am. St. Rep. 495, it was ruled that an agent who sells goods by sample, driving ¹⁵⁸ about for that purpose with his own horse and buggy, receiving a weekly salary, is not within the purview of a statute which exempts the "wages of any laboring man or woman in any sum not exceeding fifty dollars, due for services rendered by him or them, and during ninety days preceding the issue of process," etc.

In *In re Ho King*, 14 Fed. Rep. 724, it was held that a theatrical actor is not a laborer within the popular sense in which the term is used, and that the word does not include any person but those whose occupation involves physical toil and who work for wages.

We do not think the indebtedness of plaintiff in error arising under the contract we are considering is laborers' wages in the sense in which that word is ordinarily and in our statute used. By the contract Nott agreed to manufacture for plaintiffs in error good merchantable brick, for which they were to pay him a certain price per thousand. He was to hire the laborers and pay them their wages, keep the machinery in repair, feed the team furnished by the Hendersons, and furnish the oil for the machinery. Nott was a contractor, and not a laborer in the common acceptation of the term, therefore he does not come within either the words or spirit of the statute, and is not entitled to its benefits.

The decisions already cited and those in *Aikin v. Wasson*, 24 N. Y. 482; *Coffin v. Reynolds*, 37 N. Y. 640; *Balch v. New York etc. R. R. Co.*, 46 N. Y. 521; *Wakefield v. Fargo*, 90 N. Y. 213; *Groves v. Kansas City etc. R. R. Co.*, 57 Mo. 304; *Mann v. Burt*, 35 Kan. 10, in principle sustain this conclusion.

In *Balch v. New York etc. R. R. Co.*, 46 N. Y. 521, the head-note states the decision as follows: "The words 'laborers' and 'labor,' as used in the general railroad act of 1850, which gives a laborer a claim against the company for the indebtedness of a contractor in certain cases, and to a limited amount, are used in their ordinary and usual senses, and imply the ²⁵⁹ personal services and work of the individual designed to be protected. The former does not include one who contracts for and furnishes the labor and services of others, or who contracts for and furnishes a team or teams, whether with or without his own services."

In *Aikin v. Wasson*, 24 N. Y. 482, under an act making stockholders in a corporation liable for debts due its laborers and servants for service performed for the corporation, it was held that a contractor for the construction of a portion of the company's road was neither a laborer nor servant.

Mann v. Burt, 35 Kan. 10, was an action against a contractor and railroad company for labor performed by the plaintiff for the contractor upon the road under a statute which makes the railroad company liable for the debts of the contractor to "laborers, mechanics, and materialmen, and persons who supply such contractor with provisions or goods of any kind," when the railroad company fails to take from the contractor engaged in the construction of its road a good and sufficient bond. The railroad company, as one defense alleged in its answer, in substance, that the persons for whose

services the suit was brought were employed by the contractors in the capacity of foremen, clerks, timekeepers, and teamsters in connection with their teams. Plaintiff demurred to the defense, which was overruled by the trial court, and which ruling was assigned for error in the supreme court. The court, in the *syllabus*, says: "Where a teamster and his team are employed by the contractor for a certain price per day for the joint labor of both, and no agreement is made respecting the price or value of the personal services of the teamster, the debt will constitute a single and indivisible demand for which the railroad company is not chargeable": See *Atcherson v. Troy and Boston R. R. Co.*, 6 Abb. Pr., N. S., 329.

It follows from the views that we have expressed, and the decisions referred to, that the judgment of the county ¹⁰⁰ court and that of the district court should be reversed, and the cause remanded for further proceedings.

Reversed and remanded.

The other judges concur.

EXECUTION—EXEMPTIONS—LABORER.—WHO IS, WITHIN MEANING OF STATUTE: See *Consolidated Tank Line Co. v. Hunt*, 83 Iowa, 6; 32 Am. St. Rep. 285, and note; *Wildner v. Ferguson*, 42 Minn. 112; 18 Am. St. Rep. 495, and the extended note to *Brown v. Hebard*, 91 Am. Dec. 419.

STATE v. MILNE.

[36 NEBRASKA, 301.]

OFFICERS DE JURE NOT ENTITLED TO SALARY ALREADY PAID TO OFFICERS DE FACTO.—If an officer *de facto* has been paid the salary accruing during his incumbency of the office, the officer *de jure* cannot recover any compensation for the same period, although the payment to the officer *de facto* was made with full knowledge that the title to the office was in litigation.

B. F. Griffith, Coffin and Stone, and J. R. Swain, for the relator.

J. R. Hanna and Robert Ryan, contra.

³⁰¹ NORVAL, J. This is an application to this court for a peremptory writ of *mandamus* to compel the respondent, ex-county treasurer of Greeley county, to pay into the treasury of said county certain moneys received by him as the treasurer of said county, which he failed to pay over to his successor in office. After the issues were made up, the cause

was referred to Thomas J. Welty, Esq., to take the testimony, and report the same to the court with his findings of fact. The referee, after having heard the testimony, made and returned to this court his findings.

The material facts found by the referee, stated briefly, are these: On the fifth day of November, 1889, the respondent, Henry N. Milne, and one E. F. Cashman were opposing candidates for the office of treasurer of Greeley county, in this state. On a canvass of the votes of the county the canvassing board found that the respondent ~~was~~ had received a majority of the votes cast at said election for said office, and a certificate of election was duly issued to him on November 12, 1889. The respondent subscribed to and took the oath of office required by law, and executed and filed his official bond with the proper officer, which bond was approved on the twenty-first day of November, 1889. Soon after the canvass of the votes was had Cashman instituted proceedings to contest the election. A trial was had, and, on the seventh day of January, 1890, the county court of said county found that said Cashman was duly elected to, and was entitled to, the office. From this decision respondent removed the case to the district court by appeal, and, on the twenty-seventh day of October, 1891, the district court, on the evidence adduced, found that respondent received at said election four hundred and seven votes, and Cashman four hundred and three, and the latter, being in possession of the office, it was adjudged that he be forthwith removed therefrom, and that respondent be installed in said office. From the judgment so rendered no appeal was taken, and respondent entered upon the performance of the duties of the office on the twenty-eighth day of October, 1891, and held the office and received the emoluments thereof until the expiration of his term. After the decision of the county court, Cashman qualified and took possession of the office, performed the duties, and exercised the functions thereof, and received from the county the fees and salary belonging to the office until he was removed by the said judgment of ouster. At the expiration of respondent's term as county treasurer, he retained in his hands of the moneys collected by him for said county the sum of two thousand seven hundred and eighty-three dollars and ninety-five cents, which he refused to pay over to his successor, claiming the same as fees and salary of the office for the period he was excluded therefrom.

Respondent has been paid the fees and emoluments of office during the time he exercised the duties of the office.

It will be observed that the respondent claims he is entitled to retain the money in controversy as fees and emoluments ³⁰³ of the office of county treasurer of Greeley county during the time it was in the possession of Cashman, the latter having already received the compensation which attached to the office while the duties of the office were performed by him.

The question presented for determination is, whether a *de jure* county officer can recover the salary or compensation which attaches to the office while it is in the possession of an officer *de facto*, who, before any judgment of ouster has been rendered against him, has been paid by the county the salary of the office. The question has never been passed upon by this court, and the decisions in other states are conflicting and irreconcilable. In establishing a precedent we shall adopt the rule which to us seems the best supported by reason, and in harmony with judicial principles. The doctrine that the acts of an officer *de facto* are valid, so far as they affect third parties and the public, is so familiar and well settled that no citation of authorities is necessary to show it. The acts of such officer are sustained upon the ground that to question them would devolve upon every person transacting business with the officer the duty of determining for himself, at his peril, the right of the incumbent to the office he holds. Third parties assume no such risk. They are not bound to know that the person exercising the functions of a public officer, under color of authority, is rightfully in possession of the office, but are warranted in recognizing him as the legal and valid officer, and are justified in dealing with him as such. If a person pays to a *de facto* officer the fees allowed by law for his services, he is protected, and will not be compelled to pay them the second time to the officer *de jure*. We think the same principle should govern in a case like the one at bar. Cashman was the *de facto* county treasurer of Greeley county, and performed the duties of the office under color of title from January 9, 1890, to October 28, 1891, during which time he received all the emoluments which attached to the office. ³⁰⁴ He took possession of the office in good faith by virtue of the decision in his favor of the contest court, and continued to occupy the office until the respondent was declared to be entitled to the same by virtue of a judgment of ouster obtained by him against Cashman on

the final determination of the appeal in the contest case by the district court. The county board, in settling with Cashman, and allowing him the fees and salary provided by law for the period during which he performed the duties of the office, the same having been made before the respondent came into possession, had a right to rely upon the apparent title of Cashman, and to treat him as an officer *de jure*. The board was justified in allowing him the emoluments of the office upon that assumption, and the county cannot be compelled to pay them again. We are aware that courts of high authority have sustained the contrary doctrine, but the decided preponderance of authorities support the conclusion we have reached: *Steubenville v. Culp*, 38 Ohio St. 18; 43 Am. Rep. 417; *Auditors of Wayne County v. Benoit*, 20 Mich. 176; 4 Am. Rep. 882; *Parker v. Supervisors of Dakota County*, 4 Minn. 59; *Dolan v. Mayor*, 68 N. Y. 274; 23 Am. Rep. 168; *McVeany v. Mayor*, 80 N. Y. 185; 36 Am. Rep. 600; *Terhune v. Mayor*, 88 N. Y. 247; *Hagan v. City of Brooklyn*, 126 N. Y. 643; *Saline County v. Anderson*, 20 Kan. 298; 27 Am. Rep. 171; *Gorman v. Boise County*, 1 Idaho, 655; *Shaw v. County of Pima, Ariz.*, May 23, 1888; 18 Pac. Rep. 273; *State v. Clark*, 52 Mo. 508; *Westberg v. City of Kansas*, 64 Mo. 493; *Shannon v. Portsmouth*, 54 N. H. 183.

The Michigan case was this: Emil P. Benoit and George Miller were candidates for the office of county treasurer. The latter was declared elected by the county canvassers, and entered upon the performance of the duties of the office on the first day of January, 1867, and continued in such performance until November following, when, by a judgment of ouster, Benoit was declared entitled to the office. The board of county auditors, having settled with Miller, and allowed him the salary for the actual time he ³⁰⁵ held the office, refused to allow the salary for the same period to Benoit. The latter, at the close of his term, withheld, and refused to pay to his successor, two thousand five hundred and eighty-three dollars and thirty-three cents, that being the amount of salary for the time he was excluded from the office. In an action on his bond by the county to recover the sum so withheld, it was decided that he could not exact salary for the time Miller was actually in office.

Saline County v. Anderson, 20 Kan. 298, 27 Am. Rep. 171, was an action brought by Anderson against the county to recover nine hundred dollars claimed to be due as salary as county clerk from January 10 to October 10, 1876. It appears

that Anderson and one Wildman were opposing candidates for county clerk. The former received a majority of the votes, and was awarded the certificate of election. The election was contested, and the contest court decided in favor of Wildman, awarding him the certificate of election and annulling Anderson's. Wildman qualified, and took possession of the office on January 10th. Anderson prosecuted error to the district court, and the judgment of the contest court was reversed. Wildman thereupon appealed to the supreme court, where the judgment of the district court was affirmed on December 5, 1876, and the office was delivered to Anderson. Wildman was paid the salary and fees of the office up to October 10th, although the county board had, during all the time, full knowledge that the title to the office was in litigation and that the clerk *de facto* was insolvent. It was held that the clerk *de jure* had no cause of action against the county for such salary. Valentine, J., in delivering the opinion of the court, says: "Now as Wildman was an officer *de facto*, holding under color of title, every person had a right to recognize him as a legal and valid officer, and to treat him as such. The public, the county, the county commissioners, and private individuals had a right to do business with him as an officer, and to pay him for his services if they chose, without taking any risk of having to pay for such services a second time. It might be greatly to the interest of the public, or ~~see~~ of the individuals doing business with such officer, to pay him when his fees or salary become due; and should they not be allowed to consult the interest of the public and their interests to so pay him? It is not their fault that he is wrongfully in the possession of the office; and how are they to know whether he is in the possession of the office rightfully or wrongfully? Are they bound to know who is entitled to the office in advance of any final adjudication of the question by the courts? Are they bound to anticipate the decision of the courts? And are they bound to decide the question for themselves, as it thus comes up incidentally and collaterally in the payment of fees or salary? And if they should determine that the courts would eventually decide against the officer *de facto*, must they refrain from paying him any fees or salary at perhaps a great loss to themselves or to the public? Now, the interest of the public, in the 'continuous discharge' of official duties, would authorize the payment of the legal fees or salary for the performance of such official

duties to the person performing the same; and to allow a person not in the possession of the office, but who claims to be entitled thereto, to sue for the fees or salary thereof, would be to allow the question of the title to the office to be raised and determined against the officer *de facto* in a controversy in which he was not a party, and in which he could not be heard? Such certainly could not be allowed. But if this suit can be maintained, then it would be allowed. . . . It must be remembered that Wildman was not a mere usurper; but he was an officer *de facto*, having possession of the office under color of title. What would be the rule if he were a mere usurper it is not necessary for us to decide in this case. All that we now decide is, that where a person is in the possession of the office of county clerk, under color of title, and is the county clerk *de facto*, and claims to be the county clerk *de jure*, and the board of county commissioners pays to him the salary due to the rightful incumbent of ³⁰⁷ such office, the county clerk *de jure* has no action against the county board for such salary, and this notwithstanding the fact that the county board may have known at the time they paid said salary that the question as to the title of the office was in litigation, and notwithstanding the fact that the county clerk *de facto* may be insolvent. The remedy of the county clerk *de jure* in such a case is an action against the county clerk *de facto*."

The supreme court of New York in *Dolan v. Mayor*, 68 N. Y. 274, 23 Am. Rep. 168, in passing upon a case quite similar to the one at bar, held that the payment of the salary to an officer *de facto*, made while he was in possession, is a good defense to an action by the *de jure* officer to recover the same salary. This decision has been followed with approval by the same court in subsequent cases.

We are of the opinion that the respondent is not entitled to the money retained by him. He must pay the same to the county treasurer of Greeley county. A peremptory writ is allowed as prayed.

Writ allowed.

The other judges concur.

OFFICERS DE JURE—WHETHER ENTITLED TO SALARY PAID OFFICER DE FACTO.—When an officer *de facto* has received the salary, fees, and emoluments of an office he is liable therefor to the officer *de jure* in an action for money had and received: *Waterman v. Chicago etc. R. R. Co.*, 139 Ill. 658; 32 Am. St. Rep. 228, and note. A *de facto* officer has no right to the

emoluments of the office, the duties of which he performs under color of an appointment, but without legal title: *State v. Carr*, 129 Ind. 44; 28 Am. St. Rep. 163. For a further discussion of the cases involving the right of a *de jure* officer to his salary when the office is in possession of an officer *de facto*, see the extended note to *Andrews v. Portland*, 10 Am. St. Rep. 284.

GILES v. MILLER.

[26 NEBRASKA, 242.]

HOMESTEAD IN LANDS HELD IN COTENANCY.—An undivided interest in real estate, accompanied by the requisite occupancy of the owner and his family, will support a homestead claim.

HOMESTEAD, RIGHTS OF WIFE IN, NOT AFFECTED BY ACTS OF HUSBAND, WHEN.—The filing of a sworn statement by a judgment debtor, in which for the purpose of securing the exemption of his personalty, he alleges that he has no lands occupied as a homestead, and a subsequent recovery by him of that personalty, in an action of replevin brought against the purchaser at the execution sale thereof, will not estop the wife of such judgment debtor from asserting her rights in a homestead previously declared upon his land.

HOMESTEAD, HOW FAR FREE FROM JUDGMENT LIEN IN PURCHASERS' HANDS.—The purchaser of land held and occupied as a homestead, and which does not exceed the amount of the statutory exemption, takes the same free from the lien of a judgment docketed against the vendor prior to such purchase.

Rhea and Rhea, for the appellant.

G. Norberg and Walter A. Leese, contra.

247 NORVAL, J. This was an action brought by William T. Giles, plaintiff and appellant, to quiet the title to lots 3, 4, 5, and 6, in the northeast quarter of section 19, in township 7 north, of range 17 west, in Phelps county, and to enjoin the sale of said premises upon an execution issued on a judgment in favor of appellee and against one J. A. Giles. On the trial the district court found the issues for the defendant, and dismissed the action.

The record before us shows that on and for several years prior to the fourth day of March, 1889, plaintiff and said J. A. Giles were the owners of the real estate above described, each being the owner in fee of the undivided one-half interest therein; that said J. A. Giles during said time was a married man, and resided upon said premises, and occupied the same with his family as a homestead, and farmed the same; that on the said fourth day of March, 1889, said J. A. Giles, his wife, Anna L., joining with him, by deed of general warranty, conveyed his

interest in said land to the plaintiff herein, which deed was duly recorded the following day.

On the fifteenth day of October, 1888, the defendant and appellee, J. Theo. Miller, recovered a judgment against said J. A. Giles, before a justice of the peace of Phelps county, for one hundred and twenty dollars and fifty cents and costs. A certified transcript of said judgment was filed in the office of the clerk of the district court of said county, on October 18, 1888. Subsequently, on October 25, 1889, Miller caused an execution to be issued by the clerk of said court upon said transcript, and to be delivered to the sheriff of said county, who levied the same on said land, and the sheriff being about to sell the same, this suit was instituted. The proofs establish ³⁴⁸ that the premises in controversy were, at all times herein stated, of less value than two thousand dollars.

The plaintiff below contends that the filing of the transcript of said justice's judgment in the district court did not create a lien upon the lands in dispute, and that said real estate is not subject to sale upon execution issued upon said transcribed judgment, for the reason that said premises constituted the homestead of plaintiff's grantors, J. A. Giles and wife, at the time of the filing of such transcript, and from thence until the conveyance was made to plaintiff. The defendant Miller insists that a person cannot claim a homestead in lands which he owns in common with another, and inasmuch as J. A. Giles only owned an undivided interest in the property, such interest is subject to the lien of defendant's judgment against him, and may be sold on execution under it.

The precise question presented has never been passed upon by this court. That a homestead can be claimed by a tenant in common is affirmed by the courts of some of the states, while the contrary doctrine is held in other states.

Section 1 of the legislative enactment of 1879, entitled, "An act to provide for the selection and disposition of homesteads, and to exempt the same from judgment liens, and from attachment levy, or sale, upon execution or other process," provides: "A homestead not exceeding in value two thousand dollars, consisting of the dwelling-house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the

option of the claimant, a quantity of contiguous land, not exceeding two lots, within any incorporated city or village, shall be exempt from judgment liens and from execution or forced sale, except as in this chapter provided."

Neither the above provision, nor any other section of the ³⁴⁹ homestead law, specifies or defines the character of the ownership or interest in lands which is necessary to support the homestead right.

We know that the purpose of the legislature in enacting the statute under consideration was to protect the debtor and his family in a home from a forced sale on execution or attachment. Keeping this object in view, and applying the liberal rule of construction which always obtains in the interpretation of exemption laws, we are constrained to hold that any estate or interest in lands which give the right of occupancy or possession is sufficient, if coupled with requisite occupancy, to entitle the person to the benefits of the provisions of the section above quoted. The ownership need not be of an estate in fee simple, but the owner of the equitable title occupying under a contract of purchase may claim the exemption of the statute. So, we think, an undivided interest in real estate, accompanied by exclusive occupancy, will support the homestead claim. J. A. Giles, as the owner of an undivided interest in the property, was entitled to the exclusive possession as against every person but his cotenant. The quantity and value of the land being within the statutory limit, and the requisite occupancy being established, we conclude that the judgment was not a lien upon the grantor's interest in the land: *Lozo v. Sutherland*, 38 Mich. 168; *Sherrid v. Southwick*, 43 Mich. 515; *Cleaver v. Bigelow*, 61 Mich. 47; *Herdman v. Cooper*, 29 Ill. App. 589; *Feldes v. Duncan*, 30 Ill. App. 469; *Conklin v. Foster*, 57 Ill. 104; *Potts v. Davenport*, 79 Ill. 455; *Tarrant v. Swain*, 15 Kan. 146; *Thorn v. Thorn*, 14 Iowa, 49; 81 Am. Dec. 451; *Horn v. Tufts*, 39 N. H. 478; *McElroy v. Bixby*, 36 Vt. 254; 84 Am. Dec. 684; *Oswald v. McCauley*, 6 Dak. 289; *Kaser v. Haas*, 27 Minn. 406; Freeman on Cotenancy and Partition, sec. 54.

Counsel for defendant insist that J. A. Giles waived his homestead rights in the property, by reason of his having claimed certain personal property as exempt from sale ³⁵⁰ under an execution issued against him on the said judgment in favor of said Miller. It appears that prior to the issuance of the execution, under which the real estate in question was

about to be sold, and before the same was conveyed to this plaintiff, another execution was issued upon the same judgment, which was levied upon certain personal property owned by J. A. Giles. For the purpose of claiming his exemptions, the said judgment debtor presented to the officer holding the execution, and filed with the justice before whom the judgment was rendered, a schedule or inventory of the whole of his personal property, in which he stated under oath that "I am the head of a family, and have neither lands, town lots, nor houses subject to execution as a homestead under the laws of this state, and that the above inventory and appraisement contains a true list of the whole of the personal property owned by me."

The property was not released from the levy, but the same was sold under the writ to one Phare, who at the time knew that the property was claimed as exempt. Subsequently, J. A. Giles replevied the property from the purchaser, alleging in the affidavit therefor that the property was exempt. Giles was successful in the action. It is now claimed that he and those claiming under him are estopped to insist that the real estate was the homestead of J. A. Giles. No estoppel was either pleaded or proved in this case against the wife. So far as appears she had nothing to do with the filing of the inventory. It is not even shown that she knew its contents or that it had been filed, or that her husband claimed the personal property as exempt in lieu of a homestead. The homestead law was passed for the protection of the family of the debtor, and either husband or wife may claim the benefits of its provisions. The statute, in effect, provides, and it has been frequently held, that the homestead cannot be aliened or encumbered without the joint consent of both husband and wife. The husband alone cannot deed or mortgage it, so as to deprive either ³⁵¹ himself or the wife of their interest in the homestead. So we conclude that Mrs. Giles was not concluded by the acts and conduct of her husband from claiming the property as a homestead.

The case falls within the principle of the decision in *Whitlock v. Gosson*, 35 Neb. 829. In that case one William Gosson, with his three children, moved to this state from Illinois, and resided upon and occupied a tract of land in Madison county as a homestead. At the time of his removal to this state, and ever since, he had an insane wife, who was, and is, an inmate of an asylum for the insane in the state of Illinois, and has

never resided in this state. Gosson executed a mortgage on the homestead, in which he was described as a single man, and the credit was extended on the faith of that statement. It was held that the mortgagor was not thereby estopped to claim the mortgaged premises as a homestead, and that the mortgage was void as to the homestead right. Judge Post, in delivering the opinion of the court upon that question, says: "Estoppel will not supply the want of power or make valid an act prohibited by express provisions of law. The statute, in effect, declares a conveyance or encumbrance of the family homestead by the husband alone void, not only as to the wife, but also as to the husband himself. Therefore neither is estopped from asserting the homestead rights as against the grantee or mortgagee. Such is the view sanctioned by the clear weight of authority, and supported by the soundest reasoning": See *State v. Carson*, 27 Neb. 501; 20 Am. St. Rep. 681.

As the real estate in dispute was the homestead of J. A. Giles at the time of the filing of the transcript of the judgment and at the time of plaintiff's purchase, defendant's judgment was not a lien on the property. The purchaser of land which is held and occupied by the owner and his family as a homestead, and which does not exceed in value two thousand dollars, takes the same free from the lien of a ³⁵² judgment docketed prior to such purchase, but during the existence of the homestead right. In other words, a judgment is not a lien upon homestead premises, and the owner can convey the same free from his previous judgment debts: *Schribar v. Platt*, 19 Neb. 625. It follows that the plaintiff is entitled to a judgment as prayed for in his petition, and the district court erred in dismissing the action. The judgment appealed from is reversed, and a decree will be entered in this court for the plaintiff in conformity to this opinion.

Decree accordingly.

The other judges concur.

HOMESTEADS IN LANDS HELD IN COTENANCY.—A debtor occupying land as a tenant in common may have a homestead exemption therein, and as against creditors, his cotenant's consent to such occupancy is not essential: *Lewis v. White*, 69 Miss. 352; 30 Am. St. Rep. 557, and note, with the cases collected.

HOMESTEADS—SALE OF—LIEN OF JUDGMENT.—The homestead property is salable or assignable, and the purchaser can hold the land to which it attaches to the exclusion of an ordinary senior judgment creditor of his assignor or vendor until such right is in some manner terminated: *Vanstony v. Thornton*, 112 N. C. 196; 34 Am. St. Rep. 483, and extended note.

SECURITY COMPANY v. EYER.

[86 NEBRASKA, 507.]

CONFLICT OF LAWS—LEX FORI—STIPULATION IN MORTGAGE FOR PAYMENT OF ATTORNEY'S FEE, GOVERNED BY.—A stipulation in a mortgage for the payment of an attorney's fee, in the event of the bringing of a suit to foreclose the lien, cannot be enforced if it is invalid by the law of the state where the remedy on the contract is sought, although both the mortgage and a note which it secures contain a clause expressly providing that "they are made and executed under and are in all aspects to be construed by the laws" of another state where such a stipulation is binding.

Breckenridge, Breckenridge, and Crofoot, for the appellant.

H. M. Uttley, for the appellee.

509 NORVAL, J. This action was brought by the plaintiff and appellant in the district court of Holt county for the foreclosure of a mortgage on the northwest quarter of section 15, town 28, range 13 west, executed by Benjamin F. Eyer and Hattie S. Eyer, his wife, on the ninth day of July, 1886, to secure the payment of a bond or note given by said Benjamin F., 510 calling for the sum of seven hundred dollars with seven per cent interest from date thereof. To the action, C. H. Toncray, George W. E. Dorsey, the Farmers and Merchants' National Bank of Fremont, and others were made defendants. A decree of foreclosure was rendered in an amount satisfactory to the plaintiff.

Two questions are raised by the appeal:

1. Was the plaintiff entitled to an allowance of an attorney's fee and to have the same taxed as costs in the case?
2. Did the court below err in holding that Toncray, Dorsey, and the bank were not personally liable to the plaintiff for the payment of the mortgage debt?

The note and mortgage each contained a provision to the effect that, in case an action is commenced to foreclose the mortgage, the plaintiff shall be allowed by the court in the decree an attorney's fee of seventy dollars.

Counsel for plaintiff, in the brief, cite a long line of decisions from the courts of last resort of several of our sister states which hold that a stipulation in a mortgage like the one before us for the payment of an attorney's fee, in the event of an action being instituted to foreclose the same, is valid and binding. This court in repeated decisions has held, and it is now the settled law of this state, that stipulations

of this character found in contracts executed since June 1 1879, the date of the taking effect of the act repealing the attorney's fees statutes, are invalid, and will not be enforced *Dow v. Updike*, 11 Neb. 95; *Hardy v. Miller*, 11 Neb. 395; *Otoe County v. Brown*, 16 Neb. 895; *Winkler v. Roeder*, 23 Neb. 706; 8 Am. St. Rep. 155. The question being no longer an open one we shall not now attempt to examine the subject anew, or to review the authorities which hold a different view from the one enunciated by this court in the cases cited above. If the rule is changed in this state it should be by statute, and not by judicial decision.

But it is contended by counsel for plaintiff that the note and mortgage were executed in the state of Iowa, and must ⁵¹¹ be enforced according to the laws of that state, which authorize the allowance of attorney fees in foreclosure cases, where such fees are contracted by the parties. The record shows that when the mortgage was executed the mortgagee, Clarence K. Hesse, was a resident of Iowa, and that the mortgagors resided in this state, on the land covered by the mortgage. Burnham, Tulleys & Co., of Council Bluffs, were the agents of the mortgagee and negotiated the loan for him through their subagent, John L. Pierce, a resident of Norfolk, this state. The papers were drawn in Iowa and sent here for execution. The note is headed at Council Bluffs and purports to have been dated and signed there. By its terms it is payable at the banking house of Gilman, Son & Co., New York city. The uncontradicted testimony shows that the papers were executed and delivered in Nebraska. The mortgage was acknowledged in Holt county on January 9, 1886, and was filed for record in the forenoon of the same day, so it could not have been delivered in Iowa before it was placed on record. It also appears that the money was paid on the loan to the borrower in Nebraska through said John L. Pierce.

Bishop on Contracts, section 1389, says that "When the preliminaries of a contract and its formal execution have occurred partly in each of two or more states, its place of making is, as a sort of general rule, that at which, by delivery or otherwise, it first becomes a contract. For example, since ordinarily it is delivery which gives effect to the writing, a contract is commonly deemed to have been made in the state where the delivery took place, without reference to where it was written and signed. But in many cases this rule is inadequate, or its pointings are not readily understood; then

the court will look into the preliminaries, the surroundings of the parties, their domicile, the words, the nature of the contracting, and the like, from which combined whole it will deduce the result."

There can be no doubt, under the rule just stated, that ⁵¹² the evidence fixes Nebraska as the *locus contractus*. The contract having been made in this state, if that fact alone is to be considered, it is clear that the agreement to pay an attorney's fee would have to be held invalid, for, as a general rule, where there is no stipulation to the contrary, the *lex loci contractus* governs. Of course, it is competent for parties to contract with reference to the law of a particular place. Thus, where the place of performance of a contract is different from the place of making, the parties may stipulate that the contract shall be governed by the law of either place. Although New York city, in the state of New York, is mentioned in the note as the place of payment, the contract is not to be construed with reference to the law of that state, for the obvious reason there is no averment in the petition that the parties agreed or intended that the place of payment was in the state of New York, nor is the statute of that state pleaded. The note and mortgage both contained a printed clause expressly providing that "they are made and executed under, and are in all respects to be construed by, the laws of the state of Iowa."

It is urged that under the quoted stipulation the decree of the district court should have provided for an attorney's fee, in accordance with the contract of the parties, since the laws of Iowa, at the time of the making of the note and mortgage, allow attorneys' fees, when stipulated for in the contract. The books abound with decisions to the effect that parties may stipulate that either the law of the place of making the contract, or the place of performance, shall be applied by the courts in the construction of the contract, and that such stipulation is binding upon the parties; but no case has been cited by counsel for appellant, nor have we been able to find any, which holds that a provision in a contract like the one before us, providing that it shall be construed by the laws of a state other than that of the one where the contract is made, or in which it is to be performed, will govern and control. We shall ⁵¹³ not now decide the force and effect of such provision, since its determination is not essential to a proper disposition of the question under consideration; but for the

purposes of this case we shall assume that the mortgage was an Iowa contract and the law of that state governs as to its construction. But it by no means follows, because the clause in the note and mortgage in regard to attorneys' fees is valid in Iowa, that the stipulation can be enforced in this state. Attorneys' fees, in states where they are allowed by the court to the successful party, are in the nature of costs, and are taxed and treated as such. They are no part of the judgment proper: *Rich v. Stretch*, 4 Neb. 186; *Hendrix v. Rieman*, 6 Neb. 516; *Heard v. Dubuque County Bank*, 8 Neb. 10; 30 Am. Rep. 811; *Rosa v. Doggett*, 8 Neb. 51; *Hand v. Phillips*, 18 Neb. 598; 53 Am. Rep. 824; *State v. Boyd*, 85 Iowa, 740.

In general, costs are recoverable only by force of some statutory provisions, and the law of the place of the forum in respect to costs is applied. The law in force at the place the contract is made does not govern costs: *Commercial Nat. Bank v. Davidson*, 18 Or. 57. The case cited was an action brought in one of the circuit courts of the state of Oregon to foreclose a chattel mortgage on property within said state, given to secure a note made out of that state. The note contained a clause that "if not paid at maturity, ten per cent additional as costs of collection" should be recovered, which provision was valid and enforceable in the state where the note was executed. The court held that the *lex fori* governs the application of the remedy, and that the stipulation for attorneys' fees, being contrary to the public policy of the state of Oregon, would not be enforced by the courts of that state. The following quotation is from the opinion in the case: "As a general rule, the law of the place where contracts merely personal are made governs as to their nature, obligation, and construction. But I do not think that rule ⁵¹⁴ applies to an extraneous agreement, the obligation of which does not arise until a remedy is sought upon the contract, to which it is only auxiliary. In regard to such agreements, the law of the place where they are attempted to be enforced, I should suppose, would prevail. This agreement was to pay the additional percentage as costs for collection of the note, and if the courts where the note was executed would have enforced the agreement, it does not follow that the courts of another jurisdiction are bound to do so. The effect of the agreement was to provide for an increase of costs, which are only incidental to the judgment, and the allowance of which must necessarily depend upon the law of the forum. A stipulation in a note

made in Utah Territory, providing that in an action on the note the plaintiff, in case of a recovery, should be entitled to double costs, might be considered valid under the laws of that territory, and enforceable in its courts; but that certainly would not render it incumbent upon the courts of this state, in an action upon such note, to award double costs."

In our opinion the clause in the note and mortgage in the case at bar relating to attorneys' fees is invalid, and the court below did right in not enforcing it.

As to the remaining question involved in this appeal, the record before us shows that a few days after the making and recording of the mortgage in suit the mortgagors conveyed the land therein described and other lands by warranty deed to one Augusta Elwood; that on August 19, 1887, said Augusta Elwood and her husband, by warranty deed, conveyed the land to George Burke, who by quitclaim deed conveyed the property to George W. E. Dorsey on March 29, 1888, and that Elwood and wife also executed a quitclaim deed to the real estate to C. H. Toncray on April 12, 1889. It further appears that the said Elwoods executed and delivered mortgages upon the same lands as follows: On March 1, 1887, two mortgages to the Farmers' Loan and Trust Company to secure the sums ~~\$15~~ of \$24,000 and \$9,460 respectively; on April 21, 1887, a mortgage to the Oregon Horse and Cattle Company for the sum of \$18,023; on April 28, 1887, a mortgage to C. H. Toncray for \$11,516.70, and on July 2, 1888, another mortgage to Toncray for \$8,000.

On the sixth day of April, 1888, the following contract was entered into between S. H. Elwood and Toncray, Dorsey, and the bank:

"This agreement, made this sixth day of April, 1888, by and between C. H. Toncray, George W. E. Dorsey, the Farmers and Merchants' National Bank, and S. H. Elwood, witnesseth: That whereas, said Elwood has been engaged in various deals for several years, in which deals said Elwood has borrowed money, and said Toncray and Dorsey have settled and assumed the same; and whereas, said Elwood has given various mortgages, both on real and personal property, to said Toncray and said bank; and whereas, said Elwood has purchased large quantities of land for said Toncray and Dorsey in Holt county, for which lands and services said Elwood was to receive all sums over the mortgages on said lands for what said lands were sold.

"Now, this agreement witnesseth, that said Elwood hereby releases said Dorsey and Toncray from any and all claims by reason of such purchases, and from all claims and demands, of whatsoever kind and description, up to this date; and said Toncray, Dorsey, and said bank agree to, and do hereby, release said Elwood, and said Elwood's wife, from any and all claims, notes, demands of any kind or nature, except one note hereafter stated, now due them, or either of them, and agree to deed to said Elwood his home place, consisting of 720 acres, and to clear the same from all encumbrances out of the proceeds of the last three quarter sections purchased by Elwood, when the money shall be received therefrom.

"And said Toncray, Dorsey, and said bank hereby release, ⁵¹⁶ sell, and make over to said Elwood all the cattle, horses, and agricultural implements on said home place, or handled on said place, except 167 steers, which said Elwood agrees to handle for said Toncray without charge for his personal supervision. The home place above described being the north half of section 22, and the northwest quarter of the southwest quarter of section 23, and the northwest quarter of section 15, and the south half of the northeast quarter of section 10, and the southwest quarter of the southwest quarter of section 11, township 28, range 13, in Holt county, Nebraska.

"The note excepted from this agreement is a note of \$12,000, made by Mrs. Elwood in December or November, 1888, but said Elwood may pay said note by services in securing land on the same terms as heretofore. This agreement being a full and complete settlement of all claims, demands, notes, bills, or accounts existing between the parties hereto, or any claims of any kind or nature, and all evidences of debt are to be surrendered and canceled."

This contract was duly signed by the parties therein named, and was afterwards, on the twenty-fifth day of June, 1888, duly recorded.

Plaintiff insists that by virtue of the foregoing agreement he was entitled to a finding that Toncray, Dorsey, and the bank were liable for the payment of the amount due on its mortgage. The allegations in the petition under which plaintiff bases its claim to a deficiency judgment against the three parties in case the mortgaged premises do not bring enough to pay the mortgage debt are to the effect that Toncray, Dorsey, Elwood, and the bank, subsequent to the execution

of the mortgage in said petition described, acquired title to the premises, or some interest therein, and as a part of the purchase price thereof, and in further consideration of some agreement between themselves, the said Toncray, Dorsey, and the bank agreed to pay all liens ⁵¹⁷ upon the property, including the debt secured by plaintiff's mortgage.

There is absolutely no evidence in the bill of exceptions conducing to prove that either Toncray, Dorsey, or the bank assumed the payment of the mortgage as part consideration for the land. Neither of them, at the time of making the agreement, was purchasing the land, but, on the other hand, the legal title thereto was then in Dorsey, and the three parties, by the agreement under consideration, obligated themselves to deed certain lands, including the 160 acres herein involved, to Elwood, and upon certain conditions they promised to pay the encumbrances thereon. It does not appear that the quarter section has ever been conveyed to Elwood.

Upon the trial some oral testimony was introduced tending to show that it was not within the contemplation of the parties, when the agreement was made, to include plaintiff's mortgage. Whatever may have been the actual intention of the parties in that respect, the language used is certainly broad enough to include this encumbrance.

It will be observed, however, that the agreement to pay the encumbrances on the property is not absolute, but conditional. The provision of the contract is that said Toncray, Dorsey, and said bank, agree to and do hereby release said Elwood "from any and all claims, notes, demands of any kind or nature, except one note hereafter stated, now due them, or either of them, and agree to deed said Elwood his home place, consisting of 720 acres, and to clear the same from all encumbrances out of the proceeds of the last three quarter sections purchased by Elwood when the money shall be received therefrom." The parties only agreed to pay the liens from money thereafter to be derived from the sale of certain lands. There is no averment in the petition, nor is there a particle of proof tending to establish, that any part of the three quarter sections has been sold. For these and other reasons that might be stated, these parties ⁵¹⁸ are not as yet liable under the terms of said contract to pay the mortgage debt to plaintiff, and no recovery can be had against them thereunder. The decree of the court below is affirmed.

The other judges concur.

CONFLICT OF LAWS—LEX FORI, WHEN GOVERNS.—A contract valid where made is generally valid elsewhere, but no state is bound to recognize or enforce contracts which are injurious to the interests or welfare of its people, or which are in fraud or violation of its own laws: *Wasserboehr v. Boulier*, 84 Me. 165; 30 Am. St. Rep. 341. See the notes to *Fonseca v. Cunard S. S. Co.*, 25 Am. St. Rep. 664; *Armstrong v. Best*, 34 Am. St. Rep. 478; and *Woodward v. Brooks*, 15 Am. St. Rep. 108.

WHIPPLE v. HILL.

[36 NEBRASKA, 720.]

ATTACHMENT, AFFIDAVIT FOR, NOT VITIATED BY CLERICAL ERROR, WHEN.

Provided it appears from the whole contents of an affidavit on which an attachment is granted, that the plaintiff's agent has duly sworn to the statement therein relating to the nature of the claim, the attachment will not be avoided for the reason that, owing to a mere clerical error, the language actually used fails to show that the requisite oath was taken.

APPEAL—CONFLICT OF EVIDENCE.—Where a motion to discharge an attachment, on the ground that the allegations in the affidavits are not true, is decided on conflicting testimony, the ruling of the trial court will not be disturbed on appeal, unless the preponderance of evidence against it is clear and decisive.

HOLIDAY, WRIT OF ATTACHMENT ISSUED ON, NOT VOID, WHEN.—The issuance of a writ of attachment on a debt past due is a purely ministerial act, and therefore does not fall within the inhibition of a statute which declares that no "judicial business can be transacted on Sunday or any legal holiday.

Henry Nunn, for the plaintiff in error.

T. J. Doyle, contra.

¶21 **NORVAL, J.** The defendant in error commenced an action by attachment in the county court of Greeley county against plaintiff in error to recover the sum of two hundred and five dollars and ninety-five cents on a promissory note. The affidavit for the attachment was filed and the writ issued on the first day of September, 1890. Service was had on the following day. Subsequently defendant filed a motion in the county court to discharge the attachment upon the following grounds:

1. Because the allegations in plaintiff's affidavit are insufficient to sustain the attachment.

2. Because the allegations in said affidavits are untrue.

3. Because the writ of attachment was issued and served on the first day of September, 1890, which was a legal holiday.

This motion was overruled by the county court, and the attachment sustained. Thereupon the defendant prosecuted error to the district court to reverse said ruling, which resulted in affirming the decision of the county court.

The objections urged by the plaintiff in error, in his motion for a dissolution of the attachment, will be noticed in the order in which they are stated therein.

The first point made is that the allegations in the attachment affidavit are insufficient to sustain the attachment. ⁷²² The following is a copy of the affidavit upon which the attachment was granted, omitting caption and title of the cause:

"STATE OF NEBRASKA, }
Greeley County. } ss.

"Henry A. Hill, being first duly sworn, says he is the duly authorized agent of plaintiff; the said plaintiff makes oath that the claim in this action is for two hundred and five and $\frac{25}{100}$ dollars, due under contract on promissory notes. And the said Henry A. Hill also makes oath that said claim is just and that Paulina A. Hill, plaintiff, ought, as he believes, to recover thereon two hundred and five $\frac{25}{100}$ dollars. He also makes oath that said defendant, John F. Whipple, is about to remove his property, or a part thereof, out of the jurisdiction of the court with the intent to defraud his creditors, and is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors; that the said John F. Whipple has property and rights in action which he conceals, and has assigned, removed, and disposed of, and is about to dispose of his property, or a part thereof, with the intent to defraud his creditors; and fraudulently contracted the debt for which suit is brought.

"H. A. HILL.

"Subscribed in my presence and sworn to before me, this first day of September, A. D. 1890. N. H. PARKS,

"County Judge."

It is contended that the affidavit is insufficient, because the allegation therein as to plaintiff's claim is not sworn to, either by the plaintiff or her agent. The objection is not good. True, the affidavit states "the said plaintiff makes oath that the claim in this action is for two hundred and five and $\frac{25}{100}$ dollars due under a contract on promissory notes." But immediately following said averment the affidavit contains this language: "And the said Henry A. ⁷²³ Hill also makes oath that said claim is just, and that Paulina A. Hill, plain-

tiff, ought, as he believes, to recover thereon two hundred and five and $\frac{25}{100}$ dollars," from which it sufficiently appears that the affiant, H. A. Hill, makes oath to the statement in the affidavit relating to the nature of the plaintiff's claim. A printed form was used in preparing the affidavit, and, manifestly, it was an oversight on the part of the draftsman in not erasing the printed word "plaintiff" and inserting the word "affiant." But the affidavit is not for that reason defective. We think it sufficient to support the attachment.

In *Jansen v. Mundt*, 20 Neb. 320, an affidavit for an attachment was made by plaintiffs' attorney, wherein he swears "that he is the authorized attorney of the plaintiffs in the above-entitled action; that he has commenced an action," etc. It was ruled that the defect in omitting to state that plaintiffs commenced the action did not render the affidavit void, inasmuch as it appeared from the whole affidavit that the suit was brought by the plaintiffs. In principle, the case at bar is not distinguishable from the case cited.

The second objection is that the facts stated in the affidavit for the attachment are untrue. The defendant filed an affidavit denying the grounds of the attachment, and, on the hearing of the motion to dissolve, numerous affidavits were filed in support of, and in resistance of, said motion. From an examination of the several affidavits it appears that there is a sharp conflict of evidence, but we are convinced that a preponderance thereof supports the original affidavit for the attachment. The rule long adhered to in this court is, that where a motion to discharge an attachment, on the ground that the allegations in the affidavits are not true, is decided upon conflicting testimony, this court will not disturb the ruling unless the preponderance of the evidence against it is clear and decisive: *Mayer v. Zingre*, 18 Neb. 458; *Grimes v. Farrington*, 19 Neb. 44; ⁷²⁴ *Holland v. Commercial Bank*, 22 Neb. 571; *Johnson v. Steele*, 23 Neb. 82.

The remaining question to be considered is, whether or not the attachment is void because the order was issued on a legal holiday. The solution of the question necessitates an examination of two sections of the statutes.

By section 9 of chapter 41 of the Compiled Statutes it is provided that, "The first Monday in the month of September in each year shall hereafter be known as 'Labor Day' and shall be deemed a public holiday, in like manner and to the same extent as holidays provided for in section eight (8) of

chapter forty-one (41) of the Compiled Statutes of 1887." A reference to the calendar will disclose that the first day of September, 1890, on which date the attachment in question was issued, was Monday; therefore, under the foregoing provision, was a public or legal holiday. The objection to the issuance of the writ of attachment in this case on Labor Day is based upon section 38, chapter 19, of the Compiled Statutes, which declares that, "No court can be opened, nor can any judicial business be transacted, on Sunday or any legal holiday, except: 1. To give instructions to a jury then deliberating on their verdict; 2. To receive a verdict or discharge a jury; 3. To exercise the powers of a single magistrate in a criminal proceeding; 4. To grant or refuse a temporary injunction or restraining order." The legislature, by the section quoted, has prohibited the courts of the state from being opened, and from the transaction of any judicial business, with certain well-defined exceptions, on any day declared by statute to be a public or legal holiday.

It will be observed that the prohibition of the statute, so far as the transaction of business on holidays is concerned, relates to acts which in their nature are purely judicial, and does not apply to such as are merely ministerial. The language of the section is plain and unambiguous, and should not be extended by judicial interpretation beyond ⁷²⁵ the plain import of the words used. Had the legislature intended to debar courts or court officers from performing ministerial acts upon holidays words suitable to express such an intention would have been employed. If the transaction of all legal business was forbidden on such days, as is the case in some of the states, we would grant that the order in question would be void; but the statute fails to so provide. It is the opening of courts and the transaction of judicial business on legal holidays which the law forbids. This intent is clearly manifest. We search in vain for any words which indicate a different purpose. The issuance or service of legal process, such as a summons, execution, or writ of attachment, is merely a ministerial act, and therefore is not within the inhibition of the above section of the statute, and is valid, although done on a legal holiday: *Glenn v. Eddy*, 51 N. J. L. 255; 14 Am. St. Rep. 684; *Kinney v. Emery*, 37 N. J. Eq. 339; *In re Worthington*, 7 Biss. 455; *Weil v. Geier*, 61 Wis. 414; *Smith v. Ihling*, 47 Mich. 614; *Hadley v. Musselman*, 104 Ind. 459; *Whitney v. Blackburn*, 17 Or. 564; 11 Am. St. Rep. 857.

The supreme court of New Jersey, in *Glenn v. Eddy*, 51 N. J. L. 255, 14 Am. St. Rep. 684, under a statute quite similar to our own, held that a summons might be legally issued and served on the day of a general election, which day is by law made a legal holiday. Magie, J., in delivering the opinion of the court, says: "When the statute declares them to be legal holidays it does not permit a reference to the legal status of Sunday to discover its meaning, for it proceeds to interpret the phrase, so far as it is prohibitory, by an express enactment declaring what shall not be done thereon. What it thus expresses is prohibited; what it fails to prohibit remains lawful to be done. The plain intent of the statute, therefore, is to free all persons, upon the days named, from compulsory labor and from compulsory attendance upon courts as officers, suitors, or witnesses. Its true interpretation will limit the prohibition, with respect to the courts, ⁷²⁶ to such actual sessions thereof as would require such attendance."

In *Weil v. Geier*, 61 Wis. 414, the supreme court of Wisconsin, in construing a statute almost identical with the one under consideration, held that the issuance of a summons by a justice of the peace on a legal holiday is permissible, because a ministerial act. To the same effect is *Smith v. Ihling*, 47 Mich. 614.

We are convinced that a county judge, in issuing an attachment, exercises no judicial functions, and such a writ is not void because issued on a legal holiday. The conclusion reached does not conflict with the case of the *Merchants' Nat. Bank v. Jaffray*, 36 Neb. 218. It was there held that an order made by a district or county judge on a legal holiday, allowing an attachment in an action on a debt not due, is void. That decision was placed upon the ground that the granting of such an order is a judicial act. As was said by Judge Post in his opinion in that case: "When the application is made, the court or judge must determine judicially that the action is one of those contemplated by the statute, and that the showing is sufficient to entitle the plaintiff to an attachment."

The issuance of a writ of attachment on a debt past due, as already stated, is a purely ministerial act. When the proper affidavit and bond are filed it is the imperative duty of the county judge to issue the attachment. He has no discretion in the matter. The judgment of the district court is right, and is affirmed.

The other judges concur.

ATTACHMENT—EFFECT OF MISTAKES IN AFFIDAVIT FOR.—A small mistake in stating the amount of the debt, clearly shown on the face of the affidavit to be a clerical error in calculating the interest, is not fatal to the attachment: *Rainwater etc. Hat Co. v. O'Neal*, 82 Tex. 337. Defects in the affidavit do not render the judgment void, but are, at most, errors only: *Skinner v. Moore*, 2 Dev. & B. 138; 30 Am. Dec. 155. An affidavit for attachment may be amended upon motion: *Maples v. Tunis*, 11 Humph. 108; 53 Am. Dec. 779. See the note to *Fridenberg v. Pierson*, 79 Am. Dec. 166.

APPEAL—REVIEW OF JUDGMENT WHERE EVIDENCE IS CONFLICTING.—Where the evidence upon the trial of an issue of fact is conflicting, the decision of the trial court thereon will not be disturbed by the supreme court if it believes it to be warranted by the testimony: *Alabama etc. Ry. Co. v. Bolding*, 69 Miss. 253; 30 Am. St. Rep. 541, and note, with the cases collected.

HOLIDAYS.—MINISTERIAL ACTS DONE THEREON ARE NOT VOID: *Blaney v. State*, 74 Md. 153; *State v. Canty*, 41 La. Ann. 587; *Kiger v. Coats*, 18 Ind. 153; 81 Am. Dec. 351. See the note to *Story v. Elliot*, 18 Am. Dec. 426, and the extended note to *Coleman v. Henderson*, 12 Am. Dec. 290, where the validity of judicial acts performed on Sunday are discussed.

LINCOLN NATIONAL BANK v. VIRGIN.

[36 NEBRASKA, 735.]

JUDGMENTS BEYOND THE ISSUES, NO ESTOPPEL BY.—A judgment entered by a court outside the issues submitted to its determination, stands upon the same footing as one dealing with a subject matter which is entirely foreign to its jurisdiction, and is therefore a nullity.

JUDGMENT BY DEFAULT, WHAT IS ADMITTED BY.—The general rule that a default is an admission of such facts only as are properly alleged in the petition or complaint is subject to the exception, that where, in a foreclosure or other kindred proceeding, a defendant, who is called upon to disclose his supposed but unknown interest in the subject of the action, makes default he will be held to have admitted that his interest therein is subordinate to that of the plaintiff.

JUDGMENT BY DEFAULT IN FORECLOSURE SUIT HOW FAR AN ESTOPPEL.—A default by a junior mortgagee, against whom relief is sought in foreclosure proceedings, under an allegation that he has some unknown interest in the premises, which it is prayed that he may be compelled to set up, or be forever debarred from asserting, is merely an admission that the plaintiff in such proceedings has a good cause of action, and will not estop the junior mortgagee from subsequently enforcing his own lien in a suit against the mortgagor.

Norval Brothers and Lowley, for the appellant.

Colman and Colman, George B. France, and D. C. McKillip, contra.

736 Post, J. This action was commenced in the district court of Seward county, to foreclose two mortgages executed

by A. C. Virgin and wife, on the twenty-fourth day of September, 1888, to the Merchants' Bank of Utica, to secure payment of a note of the mortgagors of that date, for two thousand five hundred dollars, due six months after date. It is alleged in the petition that said note and mortgages were assigned by the Merchants' Bank to the plaintiff for value, before maturity. Upon a hearing before the district court, all of the defendants being in default except Severin and Schark, a decree of foreclosure was entered as prayed upon the mortgage described in the second cause of action, but as to the first cause of action, viz., the mortgage covering the west half of the southwest quarter of section 20, township 11, range 1 east, there was a finding for the answering defendants, and a decree dismissing the petition, from which the plaintiff has appealed. The execution of the mortgage for the consideration alleged by Virgin and wife, who were at the time the legal and equitable owners of the property, is not denied.

The defendants above named, by their answer, deny the assignment of the note and mortgage to the plaintiff, and allege that the Merchants' Bank is still the owner and holder thereof. They further allege that they are the owners in fee simple of said property, by deed from Virgin ⁷³⁷ and wife bearing date of August —, 1889; that on the sixteenth day of March, 1889, one Neir, the holder of a prior mortgage upon said premises, which was executed March 12, 1887, commenced thereon an action of foreclosure in the district court of Seward county, to which the Merchants' Bank of Utica, while still owning and holding the note and mortgage in controversy, was made a party defendant, but made default; that upon a final hearing in said action there was a finding and decree for the defendants Virgin and wife against the Merchants' Bank as to the mortgage now in question, and a decree declaring it void as to the land in controversy, by reason of which the Merchants' Bank, and the plaintiff, as its assignee, are now estopped as against them to assert any claim under or by reason of the mortgage described in the petition.

For a second defense it is alleged that the defendants purchased, for value, in good faith, relying upon the representations of the Merchants' Bank that it claimed no interest in, or lien upon, the land in controversy by virtue of the mortgage upon which this action is based.

The reply is, in effect, a general denial.

The evidence with respect to the date of the assignment of

the note and mortgage is voluminous and conflicting, but in view of our conclusion upon the other propositions it is unnecessary to critically examine that question.

The plea of *res judicata* is clearly insufficient as a defense. The decree relied on, assuming that it is a determination in favor of Virgin and wife that the mortgage under consideration is not a lien upon the premises, is not responsive to any claim or allegation in any pleading before the court, and is for that reason *coram non judice*. The petition filed by Neir contained the following allegation only with reference to the Merchants' Bank: "The defendant, the Merchants' Bank of Utica, has, or claims to have, some lien or interest in said premises, the nature of which is to plaintiff unknown, but plaintiff avers that the ⁷³⁸ same is subordinate and junior to plaintiff's claim, and plaintiff asks that it may be compelled to set the same up, or be forever barred from asserting the same." The foregoing allegation is followed by a prayer for an accounting, order of sale, and deficiency judgment. In that proceeding, as already said, Virgin and wife, as well as the Merchants' Bank, made default. In the decree, which is in the ordinary form, immediately following the finding for the plaintiff therein, is the entry upon which defendants rely, viz: "The court further finds that the defendant, the Merchants' Bank of Utica, has no right, title, or interest in the land in controversy herein."

This case rests upon an entirely different principle from those cases in which the court had acquired jurisdiction over the subject of the judgment or decree. In such cases the determination of the court, however erroneous, can be called in question only by direct proceedings. We are aware that Mr. Freeman in his work on Judgments, section 135 a, expresses a preference for the view that a judgment is erroneous merely, and not necessarily void, although not responsive to any issue of law or fact. We are, however, unable to perceive wherein a judgment entered by a court confessedly outside of the issues submitted for its determination can be said to rest upon any other or different principle than one in which the subject matter is entirely foreign to the jurisdiction conferred upon it. In the language of the supreme court of Ohio, in *Spoor v. Coen*, 44 Ohio St. 497, "a judgment by a court of competent jurisdiction in a case before it, however erroneously that jurisdiction may have been exercised, is one thing, and a judgment by a court of like jurisdiction in a case not before it,

is another and quite a different thing. In *Sheldon v. Newton*, 3 Ohio St. 494, Judge Ranney uses this language: "It is *coram judice* whenever a cause is presented that brings this power into action. But before the power can be affirmed to exist it must be made to appear that the law has given the ⁷³⁹ tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred," etc. The distinction above noted is abundantly sustained by authority: See, in addition to cases cited, *Strobe v. Downer*, 13 Wis. 11; 80 Am. Dec. 709; *Straight v. Harris*, 14 Wis. 509; *Lewis v. Smith*, 9 N. Y. 502; 61 Am. Dec. 706; *Williamson v. Probasco*, 8 N. J. Eq. 571; *Steele v. Palmer*, 41 Miss. 89; *Armstrong v. Barton*, 42 Miss. 506; 1 Black on Judgments, 183, 184.

There is no doubt of the jurisdiction of a court of equity upon proper pleadings in a foreclosure proceeding to determine the rights of all parties thereto with respect to the subject to the controversy, whether plaintiffs or defendants. But the power to conclude parties not claiming adversely to the plaintiff, whether subsequent mortgagees, or mortgagor and mortgagee, so as to prevent them from afterwards asserting their rights as against each other, depends upon whether such power has been invoked by one or more of the parties thus interested. In the judgment pleaded as a bar in this case, the only relief sought was the foreclosure of the Neir mortgage. In his petition the plaintiff therein alleged in effect that this mortgage was the prior lien. That was a proposition which the Merchants' Bank could not controvert. It is true it might have answered (assuming that it was still the owner of the mortgage), and by cross-bill secured, an accounting and decree against the mortgagors, and an order for payment from the proceeds of the mortgaged property after the satisfaction of the prior lien. The general rule is that a default is an admission of such facts only as are properly alleged in the petition or complaint: Herman on Estoppel, sec. 53. A recognized exception, however, is that where, in a foreclosure or other kindred proceeding, a defendant who is called upon to disclose his supposed, but unknown, interest in the subject of the action makes default, he will be held thereby to have admitted that his interest therein is subordinate to ⁷⁴⁰ that of the plaintiff: *Barton v. Anderson*, 104 Ind. 578. The Merchants' Bank, by its default, must be held to have confessed the cause of action of the plaintiff therein,

and to that extent the decree is conclusive. But the question of the validity of the mortgage now under consideration, as a second lien, was not presented by the petition, and the bank, as a defendant in that action, was justified in assuming that Neir, the plaintiff, was merely seeking to assert his own lien. The judgment described in the answer not being conclusive as against the Merchants' Bank, it follows that the question of the good faith of the assignment of the mortgage to the plaintiff is not material: *McWilliams v. Bridges*, 7 Neb. 419.

2. The plea of estoppel *in pais* is not sustained by the proofs. Not only was the mortgage to the Merchants' Bank of record and unsatisfied in Seward county, but the answering defendants are conclusively shown to have had actual notice of it, and to have taken counsel as to its validity. One of them, Mr. Severin, on his cross-examination, admits that previous to the purchase of the land he had a conversation with reference to the mortgage in question with Mr. Hurlburt, president of the bank, in which he was informed by the latter that said note and mortgage had been pledged to the plaintiff herein for money advanced by it. He testifies, among other things, as follows:

Q. You know at the time you bought the land that he had put up these notes at the Lincoln National Bank before you took the deed and paid the money?

A. The abstract showed the mortgage on it.

Q. Notwithstanding that decree, Mr. Hurlburt told you that he had put that mortgage up at the Lincoln National Bank?

A. He said he had put it up as collateral security.

Q. You knew that when you bought the land?

A. Yes, sir.

741 It is very evident that the defendants were fully aware of the facts with reference to the mortgage, and purchased the property in the mistaken belief that, by reason of the decree above referred to, it was no longer a lien thereon—a claim which, so far as the record discloses, had never been made by their grantors. The court therefore erred in dismissing the petition of the plaintiff. The decree of the district court will be reversed, and the case remanded, with instructions to enter a decree of foreclosure in accordance with the prayer of the petition.

Reversed and remanded.

The other judges concur.

JUDGMENTS BY DEFAULT—WHAT ADMITTED BY.—A judgment by default, after service of summons and complaint, and failure to answer, admits the truth of every material allegation in the complaint: *Philbrick v. O'Connor*, 15 Or. 15; 3 Am. St. Rep. 139, and note; *Garrard v. Dollar*, 4 Jones, 175; 67 Am. Dec. 271. A default is a mere admission of the cause of action, leaving the rights of the parties to be determined upon the defendant's motion to be heard in damages: *Welch v. Wadsworth*, 30 Conn. 149; 79 Am. Dec. 236, and note.

JUDGMENTS BY DEFAULT IN FORECLOSURE PROCEEDINGS.—CONCLUSIVENESS OF: See *O'Brien v. Moffitt*, 133 Ind. 660; 36 Am. St. Rep. 566, and note.

It is true that in section 135 a of Freeman on Judgments the author "expresses a preference for the view that a judgment is erroneous merely, and not necessarily void, although not responsive to any issue of law or of fact." The matter there under consideration, however, was a mere matter of practice, and the judgments referred to were those based upon a complaint adequate to sustain them, but to which the defendant had failed to respond either by demurrer or answer. We have no doubt that the mere failure to form an issue when one is tendered by the complaint cannot make the judgment void. If such were the case, as stated in that section, "the power of the judiciary could and would be entirely evaded by defendant's neglecting to interpose any defense, for it is only by such interposition that an issue can be formed." The matter under discussion in the principal case was not, as we understand it, the result of the failure of the defendant to raise an issue by his neglect to answer or demur to the complaint. The defect in the decree relied on was that it extended entirely beyond any issue tendered by the complaint or other pleadings. That subject is not considered at section 135 a of Freeman on Judgments, but did receive attention at section 120 c of the same volume, in which it was said that "in some instances courts have undertaken to decide questions not involved in the suit or action before them, and to grant relief thereon, and their judgments have been assailed for that reason, and, to the extent which they departed from the matters embraced in the record, they have been denied effect." The same matter received further attention from the same author in the note to *Falls v. Wright*, 55 Ark. 562, 29 Am. St. Rep. 78, in which attention was called to the fact that the case of *Reynolds v. Stockton*, 43 N. J. Eq. 11, 3 Am. St. Rep. 305, had been taken by a writ of error to the supreme court of the United States, and an opinion there rendered in harmony with the decision of the state court, and extracts were given from the opinion of Mr. Justice Brewer of the supreme court of the United States in that case. These extracts need not here be repeated; it is sufficient to say that they are in harmony with the decision in the principal case, and with the rule as stated in section 120 c of Freeman on Judgments.

SPELLMAN v. LINCOLN RAPID TRANSIT CO.

[26 NEBRASKA, 890.]

STREET RAILWAY COMPANIES, DEGREE OF CARE REQUIRED OF, IN CARRIAGE OF PASSENGERS.—A street railway company is bound to exercise the utmost skill, diligence, and human foresight in conveying its passengers, and is liable for slight negligence.

STREET RAILWAY COMPANIES—NEGLIGENCE PRESUMED FROM HAPPENING OF ACCIDENT—BURDEN OF PROOF.—In an action against a street railway company for personal injuries caused by the derailment of a car, the burden of proof lies on the carrier to rebut the presumption of negligence which is raised by the occurrence of such an accident, by showing that it was produced by causes wholly beyond his control, and that he has not been guilty of the slightest negligence contributing thereto, and that, by the exercise of the utmost human care, diligence, and foresight, the casualty could not have been prevented.

Charles A. Burke, and Stearns and Strode, for the plaintiff in error.

Webster, Rose, and Fisherdict, contra.

891 RAGAN, C. Thomas Spellman brought suit in the district court of Lancaster county, Nebraska, against the Lincoln Rapid Transit Company, alleging that it was a corporation owning and operating a street railroad in the city of Lincoln, and that on the 23d of May, 1890, while he, Spellman, was a passenger upon one of the transit company's cars, the defendant, its agents and servants, so negligently and carelessly used, managed, and controlled the said car and the engine by which it was drawn, and so negligently and carelessly managed, used, looked after, and repaired said road and the tracks and switches connected therewith, that the car in which the plaintiff was carried, and the engine drawing the same, were allowed to run off the track; that in consequence of the car running off the track plaintiff was thrown with great force and violence against the seat and the railing thereof in front of him, and then back on the seat and edges thereof behind him, and was thereby permanently injured, and that the plaintiff was careful and did not contribute to the injury in any degree whatever, and prayed for damages against the transit company.

The answer of the defendant denied all negligence of 892 itself or servants; admitted that the car was derailed as claimed by the plaintiff; denied that the plaintiff's injuries were permanent, and alleged that the plaintiff was suffering from a rupture of old and long standing. To this there was a reply, consisting of a general denial, by the plaintiff.

There was a trial to the jury, and a verdict for the transit company, and Spellman brings the case here on error.

On the trial it was admitted that the transit company was a corporation and engaged in the carrying of passengers for hire. There was no pleading or proofs that Spellman was guilty of any contributory negligence whatever. The motive power of the cars was a dummy steam engine. The evidence in the record does not afford any precise explanation for the cause of the car's leaving the track.

The trial judge, at the request of the transit company, gave the jury the following instruction:

"While it is the duty of the defendant, as a carrier of passengers, to exercise proper care for their safety, yet the defendant is not an insurer of the safety of its passengers and not liable to them for injuries resulting from such defects in its means of transportation as could not have been guarded against by the exercise of care on its part, and which are not due in any way to negligence on its part.

"The test of negligence in such cases is whether the defects ought to have been observed practically and by the use of ordinary and reasonable care."

The giving of this instruction is here assigned for error. It will be observed that the test submitted by the learned judge to the jury was whether the transit company used ordinary and reasonable care. The defendant in error was a common carrier of passengers for hire, and the question to be determined in passing upon the correctness of this instruction is, what degree of care is due from a common carrier of passengers to its passengers?

In 2 Rorer on Railroads, page 1434, it is said: "For injuries occasioned by negligence, street railways are liable, ⁸⁹³ as others are, upon common-law principles, and no more so." And on page 1436 the same authority says: "The company is bound to the highest degree of care and utmost diligence to prevent their (passengers) injury." To the same effect, see Shearman and Redfield on Negligence, sec. 226.

In *Smith v. St. Paul etc. Ry. Co.*, 32 Minn. 1, 50 Am. Rep. 550, the court say: "Street railway companies, as carriers of passengers for hire, are bound to exercise the highest degree of care and diligence consistent with the nature of their undertaking, and are responsible for the slightest negligence."

In *Sales v. Western Stage Coach Co.*, 4 Iowa, 547, the rule is thus laid down: "Carriers of passengers for hire are bound

to exercise the utmost skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skill in either themselves or their servants": See also *Bonce v. Dubuque Street Ry. Co.*, 53 Iowa, 278; 36 Am. Rep. 221.

In *Derwort v. Loomer*, 21 Conn. 245, the supreme court of that state laid down the rule thus: "In the case of common carriers of passengers, the highest degree of care which a reasonable man would use is required by law."

This is also the doctrine of the supreme court of California. See *Wheaton v. North Beach etc. R. R. Co.*, 36 Cal. 590, where it is said: "Passenger carriers, by their contract, bind themselves to carry safely those whom they take into their coaches or cars, as far as human foresight will go; that is, for the utmost care and diligence of very cautious persons."

This is also the rule in New York. See *Maverick v. Eighth Ave. R. R. Co.*, 36 N. Y. 378, where it is said: "Passenger carriers bind themselves to carry safely those whom they take into their coaches, to the utmost care and diligence of very cautious persons": See, also, *Carroll v. Staten Island R. R. Co.*, 53 N. Y. 126; 17 Am. Rep. 221.

This is also the doctrine of the supreme court of Colorado: See *Denver etc. Ry. Co. v. Woodward*, 4 Col. 1.

§ 4 This is the doctrine of the supreme court of the United States. In *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 485, it is said: "When carriers undertake to convey persons by the powerful, but dangerous, agency of steam public policy and safety require that they be held to the greatest possible care and diligence." This doctrine is reaffirmed by the same court in *Steamboat New World v. King*, 16 How. 469. See these cases cited and approved in *Indianapolis etc. R. R. Co. v. Horst*, 93 U. S. 291, where the court say, in reviewing the cases cited above: "We desire to reaffirm the doctrine, not only as resting on public policy, but on sound principles of law." They also cite *New York etc. R. R. Co. v. Lockwood*, 17 Wall. 357, and quote and affirm that case as saying: "The highest degree of carefulness and diligence is expressly exacted." Continuing the court say: "The standard of duty should be according to the consequences that may ensue from carelessness. The rule of law has its foundation deep in public policy. It is approved by experience and sanctioned by the plainest principles of reason and justice. It is of great importance that courts of justice should not relax it. The terms

in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business; but it does emphatically require everything necessary to the security of the passenger, and reasonably consistent with the business of the carrier and the means of conveyance employed.

"The rule, as gathered from the foregoing authorities, requires that a common carrier of passengers shall exercise more than ordinary care; it requires the exercise of extraordinary care; the exercise of the utmost skill, diligence, and human foresight; and makes the carrier liable for the slightest negligence."

It follows from the foregoing that the giving of the instruction complained of was error.

895 Spellman also assigns as error the giving by the court below, at the request of the transit company, instructions numbers 2 and 3. They are as follows:

"2. If the jury find from the evidence that the defendant constructed and laid its track in a proper manner, and had the same made safe and in good condition at the place of the accident complained of before it was put into use, and from time to time since, at reasonably short intervals, had the same inspected and repaired by competent track-men, specially employed for that purpose, and that the car upon which the plaintiff was riding at the time of the accident was derailed without any fault or neglect of the person or persons in charge thereof for defendant, and the same is not shown to have been caused by any defect in said road or car, then the plaintiff could not recover for any injuries caused thereby, and the jury should find for the defendant.

"3. Unless the jury find that the cause of the accident was some definite and proven defect of defendant's road, engines, or cars, or negligence on the part of defendant's employees in operating the same, and could have been avoided by exercise of proper care in inspection and repair and operation, then the jury will find for the defendant. The mere fact that the defendant's car left the track, and that plaintiff thereby sustained injury, is not sufficient to sustain a verdict for the plaintiff. To find a verdict for the plaintiff the jury must find that the defendant was in some way negligent in the care of its track or the running of its train, and the accident was caused by such negligence."

We shall consider these two instructions together. The court, in effect, told the jury by these instructions that, though Spellman might have been injured by the derailing of the car, that fact did not raise a presumption of negligence against the transit company; and further, it put the burden on Spellman of proving the particular cause of the derailment of the car.

§§ In 2 Rorer on Railroads, page 1434, it is said: "In actions against . . . (street railways) for personal injuries caused by the cars leaving the track, the burden of proof is on the company to show that there was no fault or want of care on its part": See the same doctrine in Patterson's Railway Company Accident Law, sec. 439.

The supreme court of the United States in *Stokes v. Saltonstall*, 13 Pet. 181, decided: "In an action against the owner of a stage-coach used for carrying passengers for an injury sustained by one of the passengers by the upsetting of the coach, the owner is not liable, unless the injury of which the plaintiff complains was occasioned by the negligence or want of proper skill or care in the driver of the carriage. . . . The fact that the carriage was upset . . . is *prima facie* evidence that there was carelessness or negligence or want of skill upon the part of the driver, and casts upon the defendant the burden of proving that the injury was not occasioned by the driver's fault." This case was affirmed by the same court in *New Jersey R. R. Co. v. Pollard*, 22 Wall. 341.

In *Railroad Co. v. Walrath*, 38 Ohio St. 461, 43 Am. Rep. 433, the supreme court of Ohio thus announces the rule: "On proof of injury sustained by a passenger on a railroad train by the falling of a berth in a sleeping-car, and that the passenger was without fault, a presumption arises, in the absence of other proof, that the railroad company is liable"; citing and affirming *Iron Ry. Co. v. Mowery*, 36 Ohio St. 418, 38 Am. Rep. 597.

The supreme court of Colorado in *Denver etc. Ry. Co. v. Woodward*, 4 Col. 1, adopted the rule in this language: "If a passenger is killed in consequence of the overturning of a car, a presumption arises that the casualty was the result of negligence, but such presumption may be rebutted."

The supreme court of Minnesota in *Smith v. St. Paul etc. Ry. Co.*, 32 Minn. 1, 50 Am. Rep. 550, formulates the rule as follows:

§§ "Where an injury occurs to a passenger through a de-

fect in the construction, or working, or management of the vehicle, or any thing pertaining to the service which the carrier ought to control, a presumption of negligence arises from the happening of the accident, and upon such proof the burden will devolve upon the defendant to exonerate himself by showing the existence of causes beyond his control, unless evidence thereof appears as part of the plaintiff's case."

In the course of the opinion the learned judge who delivered it said: "The severe rule, which enjoins upon the carrier such extraordinary care and diligence, is intended, for reasons of public policy, to secure the safe carriage of passengers, in so far as human skill and foresight can affect such result. From the application of this strict rule to carriers, it naturally follows that where an injury occurs to a passenger through a defect in the construction, or working, or management of the vehicle, or any thing pertaining to the service, which the carrier ought to control, a presumption of negligence arises. The rule is therefore frequently stated, in general terms, that negligence on the part of the carrier may be presumed from the mere happening of the accident. The reason of the rule seems to be that from the very nature of things the means of proving the specific facts are more in the power of the carrier. The latter, owning the property and controlling the agencies, is presumed to have peculiarly within his own knowledge the cause of the accident, which he might be interested to withhold, and might himself be unable to prove."

Such is the doctrine of the supreme court of Illinois as expressed by that court in *Peoria etc. R. R. Co. v. Reynolds*, 88 Ill. 418, where it is said: "Where a railway-car is thrown from the track, whereby a passenger for hire is injured, the presumption is that the accident resulted either from the fact that the track was out of order, or the train badly managed, or both combined, and the burden is on ^{see} the company to show it was not negligent in any respect." This is also the rule in Indiana: See *Pittsburgh etc. R. R. Co. v. Williams*, 74 Ind. 462. It is also the rule in New York: See *Seybolt v. New York etc. R. R. Co.*, 95 N. Y. 562; 47 Am. Rep. 75.

In *Feital v. Middlesex R. R. Co.*, 109 Mass. 398, 12 Am. Rep. 720, the action was against a street railway company for injuries resulting to plaintiff from an accident that happened while she was traveling in one of the defendant's cars. The plaintiff, to prove her case against the street-car company,

called the conductor and the driver of the car as witnesses, and they testified that the car ran off the track, one wheel inside, and one outside, of the track; that they, with others, left the car in question; that there was no defect in the car, the wheels, or the track; that the car was going about five miles an hour; that when they lifted the forewheels on the track, every thing was right, and the car went on; that the cars went over this place just before and just afterwards without trouble, and they did not know what made the car run off.

At the close of plaintiff's case defendant requested a ruling that the plaintiff could not recover, because she had failed to show negligence on the part of the street railway company. This motion was overruled. The railway company then introduced evidence that the road where the accident occurred had been gone over by their superintendent the day before the accident, and that there was no defect in it; that the day after the accident he saw the place where it occurred, and that there was nothing the matter with the road then, and had not been since. The railway company then requested the court to instruct the jury as follows:

"The plaintiff received her accident from the fact of the car's running off the track while traveling at a moderate rate. There is no evidence that the car was out of order. It is not claimed that the driver did any thing wrong, or ~~so~~ that the rails were before, or then, or afterwards out of order. . . . Under these circumstances the plaintiff cannot recover. That there was no evidence of any negligence on the part of the railway company. That the burden of proof is upon the plaintiff to show how the accident happened, and what was the particular negligence that caused the same; and that, unless the plaintiffs had done so, they could not recover."

The trial court refused to so instruct, and this refusal was assigned as error. On appeal to the supreme court it said: "On the trial of an action against a street railway corporation for injuring a passenger, proof that the injury was caused by a car's running off the track at a place where the track and the car were under the exclusive control of the defendants, is sufficient to charge them with negligence in the absence of any evidence that the accident happened without their fault."

In the light of the foregoing authorities the court erred in giving the instructions complained of.

In our review of this case we have not been unmindful of the suggestion of the counsel for defendant in error that the

trial court cured instruction No. 3 complained of by instructing the jury of his own motion: "A train of cars, similar to that operated by the defendant, is presumed to stay upon the track, and if such train should, for any reason, leave the track, the presumption is that it left the track through some fault of the defendant." It is not necessary to determine now whether this construction conflicted with the ones complained of, nor whether one cured the other. The greatest difficulty with the instruction complained of lies in this: "Unless the jury find that the cause of the accident was some definite and proven defect of defendant's road, engine, or cars, or negligence on the part of the defendant's employees in operating the same, and could have been avoided by the exercise of proper care in inspection, repairing, and operation, then the jury will ~~find~~ find for the defendant." Here the jury were told in effect that the burden was on the plaintiff below to prove the cause of the derailment. This is not the rule. There is no claim by any one, nor is there a word of evidence that Spellman was guilty of any negligence whatever. The transit company was a common carrier of passengers. Spellman was a passenger on its train. The car on which he was riding was derailed. He alleged he was injured thereby, and there was evidence to support the allegation. He alleged that the derailment of the car was through the carrier's negligence. The law, by presumption, supplied that proof for him. This was enough. The burden was then on the carrier to rebut this presumption of negligence by showing that it was produced by causes wholly beyond its control, and that it had not been guilty of the slightest negligence contributing thereto, and that by the exercise of the utmost human care, diligence, and foresight the casualty could not have been prevented.

The judgment of the district court is reversed, and the cause remanded, with instructions to the court below to grant the plaintiff in error a new trial.

Reversed and remanded.

The other commissioners concur.

STREET RAILWAYS—CARRIAGE OF PASSENGERS—DEGREE OF CARE.—It is the duty of a street-car company to exercise the highest practical degree of care and skill to safely carry a passenger through his trip: *Willmott v. Corrigan Ry. Co.*, 106 Mo. 535; *Watson v. St. Paul etc. Ry. Co.*, 42 Minn. 46; *Topeka etc. Ry. Co. v. Higgs*, 38 Kan. 375; 5 Am. St. Rep. 754. The exposure of a passenger to danger, which the exercise of a reasonable foresight

would have anticipated and due care avoided, is negligence on the part of the carrier: *Lehr v. Steinway etc. R. R. Co.*, 118 N. Y. 556. A street-car company is not liable as an insurer of the safety of its passengers, and is only answerable for any injury which may happen through its own negligence or that of its servants: *Wormedorf v. Detroit etc. Ry. Co.*, 75 Mich. 472; 13 Am. St. Rep. 453.

NEGLECT—PRESUMPTION OF FROM HAPPENING OF ACCIDENT.—This question is thoroughly discussed in the extended notes to *Long v. Pennsylvania R. R. Co.*, 30 Am. St. Rep. 736-738, and *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490-495. And see, also, *Thyng v. Fitchburg R. R. Co.*, 156 Mass. 13; 32 Am. St. Rep. 425.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

GILLETT v. WHITING.

[141 NEW YORK, 71.]

BROKER'S UNAUTHORIZED SALE, RATIFICATION OF.—If a broker, after making a sale of stock purchased by him for his customer, which sale was unauthorized for lack of notice of the time and place thereof, sends the customer an account of the sale, crediting him with the price realized, and he thereupon promises to pay the balance remaining due to the broker as shown by such account, and makes no objection to the sale or the want of notice, this is a ratification of the act of the broker, and entitles him to recover the sum due him for advances to the customer.

EVIDENCE—DISCRETION OF THE COURT.—When an examination of the books of a broker is sought for the purpose of discrediting his alleged purchase of certain stocks the court has discretion to exclude from such examination the names of the other customers of the broker as they appear on his books.

EVIDENCE AS TO WHAT BOOKS BROKERS USUALLY KEEP IS NOT ADMISSIBLE where the testimony shows what books were actually kept, and what became of them.

ACTION to recover a balance claimed to be due plaintiffs as stockbrokers for a loss incurred by them in purchasing certain stocks for the defendant. The plaintiffs, after demanding further margins of the defendant, sold his stocks and rendered him an account of sale as shown in the opinion of the court and thereafter brought this action to recover the amount due as shown by such account. Judgment for the plaintiffs. Defendant appealed.

Joseph A. Shoudy, for the appellant.

Ira D. Warren, for the respondent.

⁷³ FINCH, J. On a former appeal in this case it was held that the broker's sales of the stock bought for the defendant were unauthorized for lack of notice of the time and place of sale, which amounted to a conversion, and that such unwarranted sales destroyed the foundation of plaintiff's claim, and left him without remedy for the advances made: 120 N. Y. 402. It is now insisted that the second division of this court in so ruling disregarded earlier decisions to the contrary, disturbed a settled doctrine, and left it impossible to reconcile the cases: *Gruman v. Smith*, 81 N. Y. 25; *Capron v. Thompson*, 86 N. Y. 419; *Minor v. Beveridge*, 67 Hun, 1. We shall certainly try to clear the doctrine of its difficulties, and end the supposed collision of authorities when the fit occasion comes; but to make the effort now would compel us to go entirely outside of the very different question involved in this appeal. For the second division further held, referring to some evidence appearing in the record, that if it should be proved that after the unauthorized sales had been made, and after due notice of them had been given to the defendant, and after an account had been presented embodying the result, the customer promised to pay the resultant loss as a balance due, it would be conclusive ⁷⁴ upon him, and justify a judgment for the plaintiff; and the case has been tried and decided on that theory. The court charged the jury that there could be no recovery unless they became satisfied that such promise had been made with full knowledge of the facts, and submitted that question, arising upon evidence quite contradictory, as the substantial issue to be determined. What remains for us to consider is simply whether there was any evidence to sustain the verdict, which was for the plaintiff, and whether any material errors occurred in reaching that result.

The promise of the defendant, if made, can operate as a waiver of the right to notice, or as a ratification of the method of sale adopted, and so does not require that the proof should reach to the extent of an account stated, a denial of which, as a proven fact, furnishes the basis for the appellant's principal argument. Without an actual agreement upon a precise balance, and a promise to pay that as such, the evidence may still show a promise on the part of the defendant which necessarily recognizes and ratifies the sales made, and the method which the broker pursued.

The principal loss occurred from the sale of the Northwest-

ern stock. The capital advanced for its purchase by the broker was over \$8,000, and the loss on the sale about ten per cent, with only a margin of \$200 to apply on the deficiency, while the Ohio Southern cost only about \$1,100, which its own margin of \$200 fully and sufficiently protected. The Northwestern stock was sold on or about October 18, 1884, and it is agreed on all sides that on the second day of the ensuing December the brokers made up an account to that date which showed the sale made, the prices given and received, the amount of the loss, and claimed a balance due from defendant of over \$1,500, to be further reduced by the outcome of the Ohio Southern stock still remaining on hand. With the account went a letter calling for \$500 or \$600 to apply upon the deficiency, and as an approximate sum to cover the loss which could not be precisely ascertained until a ⁷⁵ sale of the Ohio Southern. This account and letter the defendant received, and, with a full knowledge of the sale made and the price realized, the evidence tends to show that he promised to pay the sum demanded. Making no objection to the sale, raising no question of want of notice to him, in no manner criticising the broker's action, the defendant accepted the result, and ratified the action which produced it, by promising to pay the deficiency. As it respects the Northwestern stock, there is abundant evidence to sustain the conclusion of the jury that the defendant waived the objection of want of notice, and ratified the sale made.

The case is equally strong as to the later sale of the Ohio Southern. That was sold in January of 1885. The defendant admits in effect that he received a notice prior thereto that unless he made good the deficiency already existing by the 28th of January the stock would be closed out. He thus had substantial notice of the time of sale, and opportunity to protect himself if he pleased, and in view of his previous waiver and assent to the mode of sale adopted, a more precise or particular notice was hardly requisite. And in addition there is again proof that after all the sales were made and when he knew they were made he promised to pay the resultant loss. He denies that, but his cross-examination weakened his credibility, and the conflict of testimony was settled by the verdict of the jury.

There were some exceptions taken on the trial, but rather technical than substantial. On the cross-examination of plaintiff, the counsel for the defendant sought to follow through

the books of account produced, not only the transaction in question, but other dealings with other people, for the avowed purpose of discrediting the alleged purchase of the brokers that had been positively sworn to, and the checks used had been produced and identified. Nevertheless, the court allowed free range of inquiry except as to the names of the other customers, and that restriction is the subject of an exception. I think it was fairly within the discretion of the court, and that such discretion was reasonably exercised.

76 The offer to prove by an expert what books are usually kept by stockbrokers was clearly inadmissible. What books the plaintiffs did keep was shown, and what had become of them. If there was basis for claiming that any were withheld, the counsel had his remedy, and could submit his inferences to the jury.

Passing by some trivial objections based on the form of answers made, we come to the exception to the court's refusal to charge that "to make defendant liable for a ratification of an unlawful sale it must appear, to the satisfaction of the jury, that he knew his legal rights." What rights were referred to, or how the plaintiff was to prove the extent of defendant's legal knowledge, we are not told, nor why the latter instead of asserting ignorance, explicitly declared that he knew plaintiff had violated his contract by selling his, defendant's, property. No ground existed for such a charge, even if in any conceivable case it could be justified. It cannot be necessary to argue seriously that there was no error in the court's refusal.

The judgment should be affirmed with costs.

All concur, except Bartlett, J., not sitting.

Judgment affirmed.

TRIAL—DISCRETION OF COURT IN ADMITTING EVIDENCE.—The trial court may exercise reasonable discretion in applying or relaxing rules for the introduction of testimony according to circumstances apparent only to the court itself, and a strict uniformity at all times is not to be expected: *Runyan v. Price*, 15 Ohio St. 1; 86 Am. Dec. 459.

AGENCY.—RATIFICATION OF UNAUTHORIZED ACTS OF: See the extended note to *Atlee v. Bartholomew*, 5 Am. St. Rep. 109-114, and the notes to *St. Louis etc. Ry. Co. v. Bennett*, 22 Am. St. Rep. 190; *Mayor etc. v. Reynolds*, 83 Am. Dec. 544, and *McHugh v. County of Schuylkill*, 5 Am. Rep. 447. A vendor having received a deposit on a sale of real estate is estopped to deny the authority of the agent making the sale: *Bogart v. Crosby*, 80 Cal. 195; *Kurns v. Olney*, 80 Cal. 90; 13 Am. St. Rep. 101, and note. As to the right of a broker to recover commissions for an unauthorized sale, see *Minor v. Beveridge*, 141 N. Y. 399, *post* 804, and note.

ISHAM v. POST.

[141 NEW YORK, 100.]

PRINCIPALS AND AGENTS, WHO ARE.—A banker holding himself out as dealing in choice stocks, and promising careful attention to his customers, occupies with such customers the relation of principal and agent.

BANKERS ACTING AS AGENTS—DEGREE OF CARE REQUIRED OF.—A banker doing business in the city of New York, and advertising himself as dealing in choice stocks, and promising his customers careful attention in all their financial transactions, must exercise as to them a degree of care commensurate with the importance and risk of the business to be done and a skill and capacity adequate to its performance. That care and skill are such as should characterize a banker operating for others in a financial center, and differ in kind from the ordinary diligence and capacity of the ordinary citizen.

A BANKER ACTING WITHOUT COMPENSATION IN MAKING INVESTMENTS for his customers is, nevertheless, under obligation to exercise such diligence as he has promised to those dealing with him, and such skill and knowledge as he has held himself out to possess.

NEGLIGENCE, WHAT IS.—A MANDATARY WHOSE SITUATION OR EMPLOYMENT IMPLIES SKILL OR KNOWLEDGE adequate to the undertaking is always answerable for losses or injuries resulting from want of the exercise of such skill or knowledge.

EVIDENCE—BURDEN OF PROOF AS TO BANKER'S LIABILITY FOR LOSS.—Upon proof that plaintiff put into defendant's hands, as his banker and agent, moneys to be loaned upon demand, for interest, and in the mode provided by custom and usage, and that such moneys had not been returned, after proper demand, the defendant must assume the burden of proving that he did his duty faithfully and without negligence or misconduct, so that the resulting loss was not his, but must justly fall upon the plaintiff.

NEGLIGENCE IS USUALLY A MIXED QUESTION OF LAW AND FACT, and is never purely one of law unless the facts are wholly undisputed and admit of no conflicting inferences.

A BANKER IS NOT LIABLE FOR NEGLIGENCE BECAUSE HE OMITTED TO INQUIRE as to the solvency of persons to whom he loaned moneys of his customer upon apparently adequate security, if such persons were in good repute at the time of the loan, and there is nothing to indicate that inquiry would or could have developed any different information from that which the banker already had.

A BANKER IS NOT TO BE DEEMED NEGLIGENT because, before loaning moneys on certificates of stock, the official signatures to which were genuine, he did not present them for verification, if there was nothing on their face calculated to arouse suspicion, though they appeared on their face to have been issued six years before the loan was made.

A BANKER IS LIABLE FOR LOANING MONEYS OF HIS CUSTOMER on fraudulently raised certificates of stock, if a fair and reasonable examination of them would have disclosed the fraud to the skilled eye of an experienced banker, or awakened a suspicion which would have led to a verification. If, on the contrary, the forgery was such as to deceive any reasonable scrutiny of a fairly prudent banker knowing the

signatures to be genuine, but not suspecting fraud in the body of the instrument, then the deception suffered would be excusable.

BANKERS—EVIDENCE TO SHOW DUE CARE.—In an action against a banker for negligence in loaning moneys on raised certificates of stock it is error to exclude testimony that he loaned a large amount of his own money on similarly raised collaterals, and that for several years the same raised certificates had been given and received on the street as collaterals for loans, and deceived the skill and care of a great number of bankers and brokers who took and held them without suspicion. Such evidence would have established the absolute good faith of the defendant in making the loan, and that he took as good care of his client's money as of his own, and that he was deceived by a forgery so perfect and skillful that it escaped for years the vigilance of the street.

ACTION to recover moneys alleged to have been placed in the hands of the defendant to be loaned for plaintiff and to be returned on demand. Judgment for the plaintiff. Defendant appealed.

Alfred Ely, for the appellant.

Frederic A. Ward, for the respondent.

104 FINCH, J. The relation between the parties to this controversy must be regarded as that of principal and agent. Post was a banker; not a member of the stock exchange, and so bound by its rules, but familiar with its customs and usages, and controlled by them to some extent whenever dealing with stocks in the Wall street market. He held himself out to **105** the business world in that character. By his circulars he advertised himself as dealing in "choice stocks," and promised his customers "careful attention" in all their financial transactions. Those who dealt with him contracted for and had a right to expect a degree of care commensurate with the importance and the risks of the business to be done, and a skill and capacity adequate to its performance. That care and skill is such as should characterize a banker operating for others in a financial center, and different in kind from the ordinary diligence and capacity of the ordinary citizen. The banker is employed exactly for that reason. Without it there might cease to be motives for employing him at all.

Isham was the trustee of an express trust, but in this dispute must be regarded simply as an individual, and without reference to his trust character. For the trial court has found as a fact that, in employing the banker to loan for him twenty-five thousand dollars, he gave no notice of the trust character attaching to the money, contracted apparently for himself,

and left Post to believe and be justified in believing that the money was his own. The evidence on the subject admits of some difference of opinion, but on this appeal the finding must control.

In the same way the question whether Post's services in making the loan were or were not to be gratuitous must be deemed settled. The finding is that those services were to be without compensation; and on that ground the appellant claims that Post was a gratuitous mandatary and liable only for gross negligence. But, while no compensation as such was to be paid, it does not follow that the banker was freed from the obligation of such diligence as he had promised to those who dealt with him, or was at liberty to withhold from his agency the exercise of the skill and knowledge which he held himself out to possess. Nothing in general is more unsatisfactory than attempts to define and formulate the different degrees of negligence, but even where the neglect which charges the mandatary is described as "gross," it is still true that if his situation or employment implies ordinary skill or ¹⁰⁰ knowledge adequate to the undertaking, he will be responsible for any losses or injuries resulting from the want of the exercise of such skill or knowledge: Story on Bailments, section 182 a; *Shiells v. Blackburne*, 1 H. Black. 158; *Foster v. Essex Bank*, 17 Mass. 479; 9 Am. Dec. 168; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 295, 19 Am. Rep. 181. In the latter case it was said that ordinary care as well as gross negligence, the one being in contrast with the other, must be graded by the nature and value of the property and the risks to which it is exposed. Post, therefore, was required to exercise the skill and knowledge of a banker engaged in loaning money for himself and for his customers, because of the peculiar character and scope of his agency, because of his promise of careful attention, and because the contract was made in reliance upon his business character and skill.

We should next consider upon whom rested the burden of proof. The plaintiff alleged and proved that he put into Post's hands, as his banker and agent, to be loaned upon demand at the high rates of interest prevailing and in the mode approved by custom and usage, the sum of twenty-five thousand dollars, which sum Post had not returned, but refused to return upon proper demand, and so had converted the same to his own use. That made out plaintiff's case. Judgment for him must necessarily follow, unless Post in answer has

established an affirmative defense. That which he pleaded and sought to prove was that the money was lost without his fault and through an event for which he was altogether blameless. In other words, he was bound to show that he did his duty fully and faithfully and without negligence or misconduct, so that the resultant loss was not his, but must justly fall upon the plaintiff: *Marvin v. Brooks*, 94 N. Y. 75; *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 267. With that burden resting upon him, we must examine his defense and the evidence given in its support, and determine whether or not it is our duty to sustain the adverse conclusion, to reverse which he brings this appeal.

The trial court has found that Post was negligent in making ¹⁰⁷ the loan upon the security of the certificates of stock taken as collateral, which had been raised by a forgery to indicate a larger number of shares than was the actual truth. Negligence is usually a mixed question of law and fact, and is never purely one of law unless the facts are wholly undisputed and admit of no conflicting inferences: *Filer v. New York Cent. R. R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327. In the face of the finding referred to we cannot reverse this judgment unless it clearly appears that upon no possible view of the facts, and upon no inferences deducible from them, can proof of negligence be found, or unless, in reaching the result, some material error in the admission or exclusion of evidence has affected the judgment rendered.

The finding of negligence, by its terms, rests upon three omissions. The admitted cause of the loss was a forgery of the number of shares of the stock given as collateral on the loan by raising that number in one certificate from seven shares to seventy, in another from eight to eighty, and in a third from three to ninety-three. The certificates were the genuine and lawful certificates of the company when issued, signed, and attested by the proper officers, and defective only in the forgery which raised the number of the shares. The loan was made to Mills, Robeson, and Smith, who were in good repute and standing at the time, but failed two days later for a very large amount. The trial court asserted Post's liability upon the ground that he took the certificates without examination, without presenting them for verification at the office of issue or of registry, and without inquiry as to the solvency of the borrowing firm.

Assuming, as the court held, and as the facts of the agency

appear to justify, that Post was bound to exercise, in making the loan, ordinary care, such as belonged to his business as a banker and to the duty he attempted to perform, we must consider the alleged omissions upon the facts disclosed in the record. In so doing we may dismiss the claim of negligence as inferred from the omission to inquire as to the solvency of the borrowers. There is no proof that inquiry would or could have developed any different information from that which ¹⁰⁰ Post already had. There is no hint of any unfavorable rumors preceding the failure, or of any doubt in any quarter of the solvency of the borrowing firm; but on the contrary the undisputed evidence is, that they were reputed to be solvent and responsible when the loan was made. There is no indication that inquiry would have yielded to Post any different information from that which he already possessed, or would have furnished the slightest reason for refusing the loan. There was certainly no negligence in omitting a new and further inquiry.

Nor do I think that ordinary care required Post, before accepting the certificates, to have presented them for verification if there was nothing on their face calculated to arouse suspicion. They had been issued, as appears by their dates, more than six years before the loan was made, but had been issued directly to Smith, who was one of the borrowing firm, and of course knew that they were genuine when the stock was transferred to him on the company's books. He had executed the usual blank assignment, which enabled them to pass from hand to hand, and which had been attested by his firm, and no suspicion could attach to them except upon a doubt of Smith's integrity, which no known fact warranted. There is no proof that it was ever a habit or custom for bankers or brokers to present such certificates for verification, and it is quite obvious that the business methods of Wall street do not admit of such a custom, suggest no necessity for its existence, and would be badly hindered and hampered by such a regulation; so that I am of opinion that in ordinary cases, and at least where the official signatures are genuine, and nothing in the body of the certificates reasonably awakens suspicion, it is not evidence of negligence that the stock was taken as collateral without verification at the company's office. Where there is nothing in the surrounding facts or on the face of the paper to create a doubt, it would be an instance of great and extraordinary care to present them for verification,

and much beyond the degree of diligence required of Post in the present case.

¹⁰⁹ There remains only the alleged omission to give the certificates a reasonable examination. I am inclined to regard that question as sufficiently debatable to prevent our treating it wholly as a question of law. And that is true, partly because of some serious conflict in the testimony, but mainly because of the inherent character of the inquiry, which is much more one of fact than of law. The evidence fairly indicates that Post personally never saw the certificates when the loan was made. In all his correspondence with Isham, and when standing on his defense, he made no such claim, but himself said he trusted too much to his clerks. Isham, in one of his letters, reminds Post of his having made that remark, and the latter does not dispute it. And as matter of fact the loan was negotiated and consummated by his managing clerk, Shephard, who was fully examined as a witness, and did not claim or pretend that he showed the certificates to Post at all. But Shephard was not incompetent. Enough appears in the evidence to indicate that he possessed the necessary skill and knowledge to properly perform the duty assigned to him. He held a responsible position in Post's office, had an extensive and valuable experience, succeeded to Post's business on his death, and testifies that he was familiar with and had handled very many of, the certificates of the company whose stock was taken as collateral. We are not justified in saying that he did not examine the forged certificates at all, and the finding of the trial court cannot mean that. What it must mean, in view of the facts, is that he gave them no close and careful scrutiny. He does not pretend that he did. He says only that they were brought to him by the messenger of the borrower, and that he took them and gave Post's check in exchange. Undoubtedly he recognized the familiar signatures, and noted the number of shares represented; but there was nothing like careful scrutiny or examination, but unhesitating trust in the honesty of the borrowers. I cannot say, as matter of law, that such was the full measure of his duty, and that he did not hastily withhold more or less of the very skill and knowledge upon which Isham relied in selecting Post to ¹¹⁰ loan for him the money. The answer made would be sufficient if it had been proved. That answer is that the forgery was so skillfully and deftly executed that no ordinary skill, exercised upon a reasonable examination,

would have disclosed the fraud, or even aroused suspicion. But we do not know that. The certificates themselves were before the trial judge, and what inference he drew from their inspection we cannot say. What we do know is that one of them raised from three to ninety-three was so skillfully changed that when Shephard and Isham examined it critically, after knowledge of the forgery, the latter thought it genuine. What Shephard thought he did not tell us, and omitted to say that what would have deceived the inexperience of Isham would also have deceived him.

But at this stage of the case the defendant realized the necessity of proof that the forgery was deft enough to deceive the skill and knowledge of any ordinary banker dealing in such securities. As I look at it, the point had become vital to the defense. If a fair and reasonable examination of the papers in the room of a hurried and momentary glance would have disclosed the fraud to the skilled eye of an experienced banker, or awakened a suspicion which would have led to a verification, then I think a finding of negligence would be justified. But if, on the contrary, the forgery was such as to deceive any reasonable scrutiny of a fairly prudent banker, knowing the signatures, but not suspecting fraud in the body of the instruments, then scrutiny would have done no good, and the deception suffered would be excusable. Just that the defendant sought to prove in two ways. He offered to show: 1. That he himself had loaned fifty thousand dollars of his own money to the same borrowers, accepting in part similar raised collateral; and 2. That for several years the same identical raised certificates had been given and received on the street as collateral for loans, and deceived the skill and care of a great number of bankers and brokers who took and held them without suspicion. Both offers of proof were refused, and the evidence excluded. I think that was error. The proof would ¹¹¹ have shown at least the character of the forgery, and that Shephard was not in fault for not discovering it.

It would have established Post's absolute good faith in the transaction, and that he took the same care of Isham's money as of his own. Of course it was not admissible to show merely that some others were no more prudent than Post, or that his own fault was less because they did the same, but it was admissible to prove that Shephard was deceived by a forgery so perfect and skillful that it escaped for years the vigilance of

the street. With that fact in the case added to what already appears, I should deem the defense sufficiently established. It was objected to this offered evidence that it might involve an examination of each separate transaction with others. That was not proposed or necessary. The witness testifying was Watson. He had been the clerk of Mills, Robeson, and Smith for eleven years, and had charge of all their loan business. The offer was to prove by him that for years these raised certificates had been used on the street as collateral for loans without a suspicion on his part, and baffling the skill and knowledge of banks, brokers, and business firms of experience and reputation. It seems to me, if that is the truth, that no fact could more conclusively establish the perfection of the forgery, and more completely excuse and justify the failure of Shephard to discover it. What was permitted to be proved makes the existence of such a fact quite probable. The certificate, raised from three to ninety-three, was well enough done to have deceived Isham, and, as to the others, it was much easier to change seven to seventy and eight to eighty without attracting notice. If this occurrence has disclosed a new danger in the business methods of the stock market, it may serve at least as a warning, and tend to make more deliberate inspection and closer scrutiny an ordinary duty.

The judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, except Bartlett, J., not sitting.

Judgment reversed.

Care Required of Bankers Acting as Agents or Bailees.

A very important part of the business of every bank, whether private or incorporated, consists of acting as an agent or bailee for its customers, and it argues much for the skill and fidelity with which this business has usually been transacted that it has not yet given rise to sufficient litigation to fully settle the law upon the subject, and to determine beyond further controversy the measure of care due from banks and their officers and agents, and the extent of the liability of the banks for the negligence or want of fidelity of such officers or agents.

Care Due From Directors to Bank.—We apprehend that when directors or other officers of banks must be regarded as negligent between themselves and their principal or corporation, and liable to such principal or corporation for the result of such negligence, third persons, dealing with the bank and prejudiced by the same negligent acts, must be entitled to recover from it for damages resulting therefrom. We shall not here undertake to consider in detail the negligence of directors or other officers of banking and other corporations, because that subject has recently received our attention in a

note to *Marshall v. Farmers' etc. Sav. Bank*, 85 Va. 676, 17 Am. St. Rep. 95-101. The result of the authorities there cited, as well as of others, is, that those officers must exercise at least the ordinary care and diligence of ordinarily prudent business men engaged in transactions similar to those to which the directors, by accepting their offices, undertake to give their attention, and that they cannot shield themselves from liability because of their ignorance of facts of which it is their official duty to be informed: *Finn v. Brown*, 142 U. S. 56; note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 637-651; *Marshall v. Farmers' etc. Sav. Bank*, 85 Va. 676; 17 Am. St. Rep. 84; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; 24 Am. St. Rep. 625; *Louisville Sav. Bank v. Caperton*, 87 Ky. 306; 12 Am. St. Rep. 488. See, however, *Swenzel v. Penn Bank*, 147 Pa. St. 140; 30 Am. St. Rep. 718. We may reasonably expect that the degree of care and skill which officers of a bank are required to exercise in its behalf, it in its turn must exercise in behalf of its customers and others with whom it is brought into business relations, or for whom it undertakes the transaction of business in the relation of principal and agent, or otherwise. "It is perhaps unnecessary to attempt to define with precision the degree of care and prudence which directors must exercise in the performance of their duties. The degree of care required depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. They are not insurers of the fidelity of the agents whom they have appointed, who are not their agents, but the agents of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention, or in neglect to use proper care in the appointment of agents: *Morawetz on Private Corporations*, sec. 551 et seq., and cases. Bank directors are often styled trustees, but not in any technical sense. The relation between the corporation and them is rather that of principal and agent, certainly so far as creditors are concerned, between whom and the corporation the relation is that of contract, and not of trust. But, undoubtedly, under circumstances, they may be treated as occupying the position of trustees to *cestui que trust*. In *Perry v. Millaudon*, 8 Mart., N. S., 68, 74, 75, which has been cited as a leading case for more than sixty years, the supreme court of Louisiana, through Judge Porter, declared that the correct mode of ascertaining whether an agent is in fault 'is by inquiring whether he neglected the exercise of that diligence and care which was necessary to a successful discharge of the duty imposed on him.' That diligence and care must again depend on the nature of the undertaking. There are many things which, in their management, require the utmost diligence and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect. There are others where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks, from the nature of their undertaking, fall within the class last mentioned while in the discharge of their ordinary duties": *Briggs v. Spaulding*, 141 U. S. 132. .

Diligence, General Rule.—From the quotation just made there can be no doubt that a bank acting as an agent or as a bailee must exercise at least the skill and diligence required of any other person or corporation undertaking duties of a like character under similar circumstances and for a like consideration. The bank must, therefore, like any other bailee, obey all lawful instructions from its principal or bailor, and exercise care and dili-

gence in accomplishing what it undertakes to perform for him: *Milwaukee Nat. Bank v. City Bank*, 103 U. S. 668. While we are not sure that the authorities sustain us, our own conclusion is, that the nature of the banking business, and the purposes which it is manifestly intended to subserve, call, in many instances, for a higher degree of care and skill than would be expected or required from other agents engaged in the performance of like duties. Thus, bankers and their employees are rightfully supposed to possess superior experience and capacity respecting the class of business in which they are engaged, and also to be provided with means for caring for and keeping, not only property of the bank, but all other property of like character of which it assumes the safe keeping, and we should expect that one depositing securities with the bank, though without directly compensating it for its services, would be entitled to recover for their loss through the negligence of the bank or its officers, though they had given such attention to the safety of the securities as would have exonerated a private person from liability. This is because it must be known that persons selecting bankers as depositaries do so because of a desire to afford their property a greater immunity from loss or destruction than is possible while it remains in their hands or in the hands of persons who have no special facilities for its safe keeping, and no special experience in guarding it from danger.

Banks Acting as Collecting Agents.—The most frequent employment of bankers as agents is in the matter of collecting choses in action deposited with them for that purpose. This topic has received such consideration in previous notes to this series that it will not be given any treatment here beyond a statement of the general principles applicable to it and a citation of some of the most recent adjudications bearing upon it: Note to *Allen v. Merchants' Bank*, 34 Am. Dec. 307–317. The general rule as to the duty of a bank is, that it is “bound to use all reasonable diligence to protect the interests” of the holder of the property: *German Nat. Bank v. Burns*, 12 Col. 539; 13 Am. St. Rep. 247; *Hazlett v. Commercial Nat. Bank*, 132 Pa. St. 118. “It must use due diligence in taking all such steps by presentment, demand, and notice as are necessary to fix the liability of all parties to whom its principal has the right to resort for payment”: Note to *Allen v. Merchants' Bank*, 34 Am. Dec. 308–312.

Immediate Officers of the Bank.—The authorities agree with respect to the general rule imposing diligence on a bank undertaking to collect commercial paper received by it for that purpose, but disagree as to its liability for the negligence or other wrong of persons whom it must necessarily employ in making such collection, or in fixing the liability of the respective parties to the paper. As to the immediate servants or agents of the bank, there is no doubt that it is liable for their defaults: Note to *Allen v. Merchants' Bank*, 34 Am. Dec. 313; *Pahquioque Bank v. Bethel Bank*, 36 Conn. 325; 4 Am. Rep. 80; but the collection is often such that all parties must understand that the bank must transmit the paper to a distant point, that measures may there be taken by some bank or other correspondent, and whether such transmission is necessary or not, the services of a notary may be required in making presentment or protest to charge parties liable on the paper only in the event of due presentment and protest being made and due notice thereof given.

As Notaries Are Public Officers Employed to perform duties as such, a bank employing them is justified, in the absence of any thing tending to indicate their unfitness, in presuming that they know their duties and will perform them with due diligence and in the mode prescribed by law. The general

rule obtaining in a majority of the states is, "that a bank receiving commercial paper as an agent for collection properly discharges its duties in case of nonpayment by placing the papers in the hands of a notary public to be proceeded with in such manner as to charge the parties to it and to secure the rights of the real owner, and that the bank is not liable in such cases for the failure of the notary to perform his duties": *Bowling v. Arthur*, 34 Miss. 41; *Gallipolis Bank v. Butler*, 41 Ohio St. 519; 52 Am. Rep. 94; note to *Allen v. Merchants' Bank*, 34 Am. Dec. 313. The notary is not, in contemplation of law, the agent of the bankers calling his services into requisition. In deciding this question, the supreme court of the United States said: "It is enough here that the notary was not in this matter the agent of the bankers. He was a public officer whose duties were prescribed by law; and when the notes were placed in his hands in order that such steps should be taken by him as would bind the indorsers if the notes were not paid, he became the agent of the holder of the notes. For any failure on his part to perform his whole duty, he alone was liable; the bankers were no more liable than they would have been for the unskillfulness of a lawyer of reputed ability and learning to whom they may have handed the notes for collection in the conduct of a suit brought upon them": *Britton v. Nicolls*, 104 U. S. 757, 766; *Citizens' Bank v. Howell*, 8 Md. 530; 63 Am. Dec. 714; *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648; 40 Am. Dec. 83; *Hyde v. Planters' Bank*, 17 La. 560; 36 Am. Dec. 621; *Bellemire v. Bank of United States*, 4 Whart. 105; 33 Am. Dec. 46; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13; 45 Am. Dec. 72; *Warren Bank v. Suffolk Bank*, 10 Cush. 582; *Stacy v. Dane County Bank*, 12 Wis. 629; *May v. Jones*, 88 Ga. 308; 30 Am. St. Rep. 154. There are states, however, in which the relations of a collecting bank and the notary are deemed to be those of principal and agent, and in which a bank is therefore held answerable for negligence or other misconduct on the part of the notary through which the owner of the paper suffers loss: *Miranda v. City Bank*, 6 La. 740; 26 Am. Dec. 493; *Thompson v. Bank of South Carolina*, 3 Hill (S. C.), 77; 30 Am. Dec. 354; *Ayrault v. Pacific Bank*, 47 N. Y. 570; 7 Am. Rep. 489; *American Exp. Co. v. Haire*, 21 Ind. 4; 83 Am. Dec. 334. There is still a third line of decisions which, without affirming or denying, the general liability of a collecting bank for the negligence of notaries employed by it, have held it answerable for the negligence of a notary because he was also an officer of the bank or because his special relations to it were such that he should be regarded as performing duties as its agent, though such duties were also of an official nature: *Woodriver Bank v. Omaha First Nat. Bank*, 26 Neb. 744; *Gerhardt v. Boatmen's S. I.*, 38 Mo. 60; 90 Am. Dec. 407.

Liability for Correspondents and Other Subagents.—If the person or agent selected by the bank is not a public officer charged with the performance of official duties, the authorities are still more evenly divided than in the case of notaries public in answering the question whether he is to be regarded as the agent of the collecting bank or of the person employing it to make the collection, or to do the acts necessary to preserve the liability of all persons connected with the paper. Those courts which deem the subemployee to be the agent of the collecting bank hold it liable for his negligent acts or other misconduct within the line of his duties, while those courts which deem him to be the agent of the owner of the paper necessarily exonerate the bank from liability for his negligence or other wrong, because they regard his acts as being the acts of the owner of the paper and his negligence as the negligence of such owner.

If the paper left with the bank is such that it must be sent to a distant

point for the purpose of receiving payment or of taking steps necessary to preserve the liability of the parties thereto, or to charge with liability persons who are not liable except after certain steps have been taken, the authorities agree that it is the duty of the bank to forward the paper to a suitable person or correspondent at the place where the necessary action must be taken, and that for the negligence of the bank in not so forwarding the paper or in selecting an agent whom it knows, or should know, to be unfit for the purpose, it is answerable for injuries resulting to the owner of the paper: *Drover's Bank v. Anglo-American Packing Co.*, 18 Ill. App. 191; *German Nat. Bank v. Burns*, 12 Col. 539; 13 Am. St. Rep. 247; *Merchants' Nat. Bank v. Goodman*, 109 Pa. St. 428; 58 Am. Rep. 728; *Drover's Bank v. Anglo-American etc. Co.*, 117 Ill. 105; 57 Am. Rep. 855. If, however, it is clear that there is no want of care in selecting the correspondent or other agent, the bank manifestly can be held responsible for his misconduct only upon the ground that he is its agent for whom it must be answerable upon the same principle upon which it is liable for the acts of its officers or other agents under its immediate control. The person thus selected must be the agent either of the bank or of the owner of the property, and if the agent of the latter, it follows that he has an agent whom he did not select, of whose fitness he has no means of judging, and of whose very existence he may not be aware. It is difficult to determine upon which side the greater number of decisions are, but among those declaring the person selected to be the agent of the bank selecting him, and that such bank is therefore answerable for his want of due care, and for his embezzlement or other misconduct, are the decisions of the English courts and of the supreme court of the United States, and we therefore feel warranted in asserting that the weight of authority is against the banks, and does not require the owner of the paper to suffer from the negligence of agents selected by the bank, though in such selection there was not any want of care, and the person selected was apparently a suitable person to transact the business intrusted to him: *Streissguth v. Natural G. A. B.*, 43 Minn. 50; 19 Am. St. Rep. 213; *Muckersy v. Ramsay*, 9 Clark & F. 818; *Allen v. Merchants' Bank*, 22 Wend. 215; 34 Am. Dec. 289, and note; *Simpson v. Waldby*, 63 Mich. 439; *Hoover v. Wise*, 91 U. S. 308; *Lindborg Bank v. Ober*, 31 Kan. 599; *Bradstreet v. Emerson*, 72 Pa. St. 124; 13 Am. Rep. 665; *Dodge v. Savings & T. Co.*, 93 U. S. 379; *Cobb v. Becke*, 6 Ad. & El. N. S., 930; *Ayrault v. Pacific Bank*, 47 N. Y. 570; 7 Am. Rep. 489; *Titus v. Mechanics' Nat. Bank*, 35 N. J. L. 588; *Wingate v. Mechanics' Bank*, 10 Pa. St. 104; *Kent v. Dawson Bank*, 13 Blatchf. 237; *Van Wart v. Woolley*, 3 Barn. & C. 439; 5 Dowl. & R. 374; *Exchange Bank v. Third Nat. Bank*, 112 U. S. 276. Considering the state courts alone, we think the preponderance of decision is in favor of the proposition that the liability of the bank extends merely to the exercise of due care in selecting a competent agent and the transmission of the paper to the latter with proper instructions, and that the agent thus selected is not the agent of the bank selecting him, but of the owner of the paper, and hence that the bank cannot be held answerable for his defaults in any respect if it has used due care in his selection: *Columbia Second Nat. Bank v. Cummings*, 89 Tenn. 609; 24 Am. St. Rep. 618; *First Nat. Bank v. Sprague*, 34 Neb. 318; 33 Am. St. Rep. 644; *Daly v. Butchers' etc. Bank*, 56 Mo. 94; 17 Am. Rep. 663; *Third Nat. Bank v. Vicksburg Bank*, 61 Miss. 112; 48 Am. Rep. 78; *Guelich v. State Bank*, 56 Iowa, 434; 41 Am. Rep. 110; *Lawrence v. Stonington Bank*, 6 Conn. 321; *Jackson v. Union Bank*, 6 Har. & J. 146; *Fabens v. Mercantile Bank*, 28 Pick. 332; 34 Am. Dec. 59; *Etna Ins. Co. v. Alton C. B.*, 25 Ill. 246; 79 Am. Dec. 328.

As Bailees of Special Deposits.—The duty assumed by a majority of the banks in caring for and safely keeping valuable securities and other property, for the safekeeping of which they have special facilities, has given rise to considerable litigation, and here also there is a want of harmony in the decisions respecting the degree of care which a bank must exercise to relieve itself from liability in the event of loss. The securities deposited with it may have been received as collateral to some loan by it, or it may have undertaken to act as the bailee thereof either for some special consideration or for no other consideration than the fact that what it undertakes to do may tend to attract new or retain old customers, or in some other way to promote the interests of the bank. Doubtless, a higher degree of care is exacted when what the bank does is for a direct consideration than when it acts gratuitously and for the mere accommodation of its customers and others.

In some of the decisions the ground was taken that the keeping of special deposits was not in any sense necessary to the carrying on of the business of banking, and therefore, that if the cashier of a national bank received a special deposit, and issued a receipt therefor, purporting to act in his official capacity, that such act was outside of the powers and duties of his office, and could not impose any liability on the bank for the loss of such securities, even though it resulted from gross negligence: *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82; 36 Am. Rep. 582; *Wiley v. First Nat. Bank*, 47 Vt. 546; 19 Am. Rep. 122. The construction given by these decisions to the banking acts of the United States has been repudiated by the national courts, which have determined that the keeping of special deposits for customers is within the power of the national banks, and even if it were not, that if an officer of the bank actually received such deposit with the acquiescence of the directors, the bank cannot escape liability by the plea of *ultra vires*: *First Nat. Bank of Carlisle v. Graham*, 100 U. S. 699; *Third Nat. Bank v. Boyd*, 44 Md. 47; 22 Am. Rep. 35. There is, therefore, now no doubt that the reception by a bank of a special deposit, to be thereafter returned to the person from whom it was received, imposes upon it some duty respecting the safekeeping of the deposit, and some liability for a loss resulting from the nonperformance of such duty.

If the Securities Were Received as Collateral to a Loan, though the bank is not to be compensated for their safe keeping otherwise than by the incidental advantage which may accrue to it from such loan and the profits to be derived therefrom, the bank, whether the debt secured has been paid or not, is under obligation to exercise at least ordinary care, and liable for any loss resulting from want of such care: Note to *Griggs v. Day*, 32 Am. St. Rep. 721; *Jenkins v. National Bank*, 58 Me. 275. Differences of opinion may exist in every case as to whether the care actually taken amounted to ordinary care or not, and this question must generally be determined by the jury, acting under the instructions of the court. In one case in which certain coupon bonds and stocks had been stolen from the bank in consequence, as was alleged, of the failure to exercise ordinary care in their custody, the jury were charged that "the defendant would be responsible if the jury found, from the evidence, that the bonds had been stolen in consequence of the failure on the part of the defendant to exercise such care and diligence in the custody or keeping of them as, at the time, banks of common prudence, in like situation and business, usually bestowed in the custody and keeping of similar property belonging to themselves; that the care and diligence ought to have been such as was properly adapted to the preservation and protection of said

property, and to have been proportioned to the consequence likely to arise from any improvidence on the part of the defendant"; and further, "that the jury may take into consideration whether it was a proper precaution for the defendant to have had an inside watchman at night, and on Sundays, whether such watchman ought to have kept awake at night, and whether the bank ought ever to have been without an inside watchman at any part of the day on Sunday, and that they may take into consideration the nature and value of said bonds, their liability to loss, the temptation they offered to theft, the difficulty of recovering them if stolen, the situation of the building and vault, and the sufficiency of the safe in which the defendant kept them at the time they were stolen": *Third Nat. Bank v. Boyd*, 44 Md. 47; 22 Am. Rep. 35, 41. The decision last cited has received the approval of the supreme court of the United States in a case in which it appeared that though securities had originally been deposited for safe keeping merely, they had afterwards been left with the bank pursuant to an understanding that they should be held as security for any overdrafts which might be made by their owners. "The deposit," said the court, "by its change from a gratuitous bailment to a security for loans became a bailment for the mutual benefit of both parties, that is to say both were interested in the transactions. For the bailor it obtained the loans, and to that extent was for his advantage; and to the bailee it secured the payment of the loan, and that was to his advantage also. The bailee was therefore required, for the protection of the bonds, to give such care as a prudent owner would extend to his own property of a similar kind, being in that respect under an obligation of a more stringent character than that of a gratuitous bailee, but differing from him in that he thereby became liable for the loss of the property if caused by his neglect though not amounting to gross negligence": *Preston v. Prather*, 137 U. S. 604, 612.

In a case decided by the court of appeals of New York, it was shown that the loan for which collaterals were originally deposited had been paid, yet they were left with the bank upon an understanding that they should be held to secure such advances as might thereafter be made by the bank to their owner; that the securities were kept in a steel box belonging to the bank and inclosed in an iron safe, and that upon both the box and the safe were locks, the combinations upon which were known only to the president and cashier of the bank; that the latter officer had borne a good reputation for many years, but was ultimately removed from his position upon a claim that he was a defaulter; that the officers of the bank were charged with making quarterly examinations pertaining to the affairs of the institution, but as a matter of fact, they made such examinations semi-annually only, and made no examination whatever respecting the special deposits, unless there were existing loans thereon, and they never made any list of such deposits, though it was the custom to receive and keep them; and the officers, other than the cashier, claimed that they did not know of the deposit in question, and that there was no evidence respecting the time or mode of its loss. The court was of the opinion that, under the circumstances, the bank was not a gratuitous bailee but received compensation and was charged with the exercise of a high degree of care in the keeping of the deposit; that the evidence did not show the exercise of reasonable care by the bailee in the custody of the bonds after the loan was discharged; and that this want of care was especially manifested by there being no list of the deposits and no means taken from time to time to ascertain whether they remained on hand or not; that a "course of business affording such opportunities to fallible

guardians presents an irresistible temptation to use the property under their control for illegal purposes and usually resulting in the loss of the securities thus exposed": *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 271.

Though the bonds or other securities left with the bank for safe keeping may not be received or retained as collateral to any loan, yet they may have such connection with the business of the bank that its undertaking to care for them is not, in contemplation of law, gratuitous, and its duty is more onerous than if it were a mere mandatary. Securities were deposited with a bank with the understanding that they should be exchanged by it for securities of a different class. In considering the nature of the transaction and the duty and liability of the bank, the court said: "The transaction, in the light we are now considering it, amounts to the deposit of certain securities with an undertaking to return those of a different class, and was within the scope of the general business of the bank. The court made no finding as to the fact whether the bank received, in this particular case, compensation, though it is found that generally in such business it was in some form compensated. As to the liability of the bank the transaction is governed by the same rules which would apply in the case of the deposit of money to be repaid in different currency, or the receipt by the institution of commercial paper for collection. Can it be claimed that the deposit of a draft in bank, under a special agreement that it shall be collected and the proceeds paid in gold or United States securities, creates a bailment in the nature of a mandate? We are unable to see any distinction between a transaction of that kind and the one before us. If no agreement was made for the payment of compensation to the bank, or if it was agreed that none should be paid, in neither case is its liability different from the case of deposits of money securities or commercial paper for purposes within the limits of its general business. It would startle the commercial and financial world to announce the rule contended for by defendant's counsel, that banks receiving securities from their customers for a purpose within the limits of their proper business, even without compensation, are liable only as mandataries": *Leach v. Hale*, 31 Iowa, 69, 72; 7 Am. Rep. 112.

Special Deposits, Without Compensation.—Where a Special Deposit Is Not as Collateral and the bank must be regarded as acting without any other consideration than the pursuit of such policy as its managers think will secure or retain business for it, it is undoubtedly liable for a loss through gross negligence: *Manhattan Bank v. Walker*, 130 U. S. 267; *Chattahooche Nat. Bank v. Schley*, 58 Ga. 359; *First Nat. Bank v. Graham*, 85 Pa. St. 91; 27 Am. Rep. 628; and there are many decisions affirming that it is answerable only when its negligence may properly be characterized as gross: *Ouderkirk v. Central Nat. Bank*, 119 N. Y. 263; *First Nat. Bank of Carlisle v. Graham*, 79 Pa. St. 106; 21 Am. Rep. 49; *De Haven v. Kensington Nat. Bank*, 81 Pa. St. 95; *Foster v. Essex Bank*, 17 Mass. 479; 9 Am. Dec. 168; *Smith v. First Nat. Bank*, 99 Mass. 605; 97 Am. Dec. 59; *First Nat. Bank v. Ocean Bank*, 60 N. Y. 278; 19 Am. Rep. 181; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82; 36 Am. Rep. 582; *Hale v. Rawallie*, 8 Kan. 137; *Dunn v. Kyle's Exr.*, 14 Bush, 134. In truth, the language of some of the decisions is so extreme as rather to invite fraud and inattention on the part of the officers and agents of banks having the custody of special deposits. The assertion that such banks are liable for gross negligence only is well calculated, if generally accepted as true, to thwart the only purpose for which such a deposit is ever made. Thus applying to banks and special deposits therein the rule applicable to other mandataries, it was said, "A bailee without reward is not bound to

ordinary diligence, is not responsible for that care which every attentive and diligent person takes of his own goods, but only for that care which the most inattentive take": *First Nat. Bank v. Rex*, 89 Pa. St. 308, 312; 33 Am. Rep. 767. We think the language of the decisions asserting that banks are liable in only the case of gross negligence is misleading, and in many instances does not fairly express the real view of the courts by which such language has been employed. Thus one court, after asserting the rule of gross negligence, adds: "The nature of the property and purposes the parties had in view, as appears from the quality of the property and character of the act of deposit, are a part of the case. Banks are instituted, and its buildings constructed, for the delivery in, and safe keeping of, money and money securities; and these bonds were deposited in defendant's bank for greater security of the bonds—'for safe keeping.' And it must be implied that the defendant undertook to use all appliances for the security of its property for 'the safe keeping' of plaintiff's bonds and in good faith": *Whitney v. National Bank*, 55 Vt. 155, 159; 45 Am. Rep. 598.

That a bank undertaking to keep special deposits of valuable articles is always liable for a loss incurred from its negligence, though such negligence may not be what, in the popular sense of the words, would be understood as gross negligence, must, we think be affirmed for two reasons: 1. Because a bank usually represents itself to have special facilities for the safe keeping of such articles and to exercise special care in their custody; and 2. While it may not receive any direct compensation for its service, it obtains advantages therefrom in attracting and retaining clients. Thus, where it appeared that private bankers had a large vault in which they permitted their customers to keep boxes of valuable securities, and a box containing such securities, deposited by a regular customer or depositor, was afterwards lost by being left unattended for a period sufficiently long to permit a thief to enter the bank and carry the box away during the temporary absence of the receiving teller and the other officers of the bank, the court said, "The plaintiff had a good bank account with the defendant, and they doubtless found it profitable to receive cash deposits from their customers. It is not probable that the defendants prepared this large vault, the numerous metallic checks, and made such ample preparations to receive and take care of boxes containing valuable articles, scrips, bonds, and marketable securities of every kind merely as an act of disinterested benevolence. On the contrary, it is shown that the owners of nearly all the boxes kept their currency deposited with the defendants; and we think the object of this vault, holding out to business men a safe place to keep their valuable boxes, was to induce the deposit of money in the bank of the defendants. Their object was doubtless to increase their deposits, and, of course, enhance their profits; and to accomplish it they held themselves out to the business community as prepared to take care of their valuable boxes. The taking care, therefore, of these boxes was a part of the business of the bank by which they doubtless induced cash deposits and made considerable profit. We therefore do not regard the deposit in question as only a gratuitous one. Something more than no gross negligence or fraud was expected from the defendants. They were not merely gratuitous bailees receiving a voluntary deposit and liable only for 'gross negligence or fraud'; they were bound to exercise such diligence as prudent bankers would exercise in taking care of and preserving a thing of that character deposited with them." The court, however, granted a rehearing, and exonerated the bankers from liability on the ground that "the abstraction of the bonds seems to have been one of those bold and adroit acts

which are occasionally carried out successfully in defiance of ordinary prudence and diligence": *Levy v. Pike*, 25 La. Ann. 630. In *Mawry v. Coyle*, 34 Md. 235, 247, an instruction was approved which required the jury in order to entitle the plaintiff to recover for a loss of bonds and securities deposited, to find that the loss occurred through the failure of the defendants to use such care in the custody and keeping of such bonds, as persons of common prudence in their situation and business usually bestowed in the custody and keeping of similar property belonging to themselves. The most satisfactory and reasonable cases upon this subject are *Preston v. Prather*, 137 U. S. 604, and *Gray v. Merriam*, 148 Ill. 179; 39 Am. St. Rep. In these cases the courts, if they may be regarded as accepting the rule, that a bank gratuitously keeping a special deposit is liable only for gross negligence, gave a definition of these terms not consistent with the popular acceptance of their meaning, and showed, as we think, that a banker is guilty of gross negligence unless he exercises at least ordinary care, taking into consideration the character of the property of which he is bailee, and the consequent danger of its loss unless unusual precautions are taken to prevent its appropriation by thieves, burglars, or dishonest employees of the bank.

The bonds in question were stolen and disposed of by an assistant cashier of the bank, and the bank had been informed that such cashier was speculating on the board of trade of Chicago, although he was entirely dependent on his salary. He had free access to the vaults where the securities of the bank were kept, and was continued in its service after knowledge of his speculations. In response to the contention of the bankers that they were simply gratuitous bailees, and were not chargeable, unless the loss resulted from their gross negligence, the supreme court of the United States, in the case reported in 137 U. S. 604, said: "Undoubtedly if the bonds were received by the bank for safe keeping, without compensation to them in any form, but exclusively for the benefit of the plaintiffs, the only obligation resting upon them was to exercise over the bonds such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. No one taking upon himself a duty for another, without consideration, is bound, either by law or morals, to do more than a man of that character would do generally for himself under like conditions. The exercise of reasonable care is in all such cases the dictate of good faith. An utter disregard of the property of the bailor would be an act of bad faith to him. But what will constitute such reasonable care will vary with the nature, value, and situation of the property, the general protection afforded by the police of the community against violence and crime, and the bearing of surrounding circumstances upon its security. The care usually and generally deemed necessary in the community for the security of similar property under like conditions would be required of the bailee in such cases, but nothing more. The general doctrine, as stated by text-writers and in judicial decisions, is that gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping. But gross negligence in such cases is nothing more than a failure to bestow the care which the property in its situation demands; the omission of the reasonable care required is the negligence which creates the liability; and whether this existed is a question of fact for the jury to determine, or by the court where a jury is waived: See *Steamboat New World v. King*, 16 How. 469, 474, 475; *Railroad Co. v. Lockwood*, 17 Wall. 357, 383; *Milwaukee etc. Ry. v. Arms*, 91

U. S. 489, 494. The doctrine of exemption from liability in such cases was at one time carried so far as to shield the bailees from the fraudulent acts of their own employees and officers, though their employment embraced a supervision of the property, such acts not being deemed within the scope of their employment. . . . As stated above, the reasonable care which persons should take of property intrusted to them for safe keeping without reward will necessarily vary with its nature, value, and situation, and the bearing of surrounding circumstances upon its security. The business of the bailee will necessarily have some effect upon the nature of the care required of him, as, for example, in the case of bankers and banking institutions having special arrangements by vaults and other guards, to protect property in their custody. Persons therefore depositing valuable articles with them, expect that such measures will be taken as will ordinarily secure the property from burglars outside and from thieves within, and that whenever ground for suspicion arises an examination will be made by them to see that it has not been abstracted or tampered with; and also that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of such measures would in most cases be deemed culpable negligence, so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor." The views thus expressed by the supreme court of the United States were quoted and applied in *Gray v. Merriam*, 148 Ill. 190, 39 Am. St. Rep., a case involving the same deposit and the same loss by the act of the assistant cashier, considered by the supreme court of the United States.

In no case, in the absence of an express contract to that effect, is a bank an insurer of the safety of bonds or other valuable articles or securities left in its care. It must, however, in all cases, either return them to the owner or show some valid excuse for not returning them. Therefore, as held in the principal case, when it has received a special deposit, and, after demand, has failed to return it, the burden of proof must be assumed by it, and, to exonerate itself from liability, it must either show that it made some disposition of the property authorized by the owner, or that it has been lost without fault on its part. "It necessarily follows from the nature of the obligation and the refusal to return the property that the burden of showing the circumstances of the loss rests upon the bailee, and unless the evidence shows the exercise of due care by him according to the nature of the bailment, he will be held responsible for a breach of the contract to return the property bailed": *Ouderkirk v. Central N. Bank*, 119 N. Y. 267.

From the loss of the property actionable negligence is presumed. But for this presumption it would rarely be possible for the owner of a deposit to obtain relief. As he is not in possession of it, and cannot know in what mode it has been kept, he has no means of establishing the negligence of the bank or of its agents. In some instances, banks have sought to throw the burden of proof upon the owner of the property, and, without attempting any explanation of its disappearance, have, to all inquiries, merely returned the answer, that the bank had no such property in its custody. It is now well settled that this is not sufficient, and the banker must prove the exercise of the degree of care required of him by the decisions in the jurisdiction in which the loss occurred and in which his liability is sought to be enforced: *First Nat. Bank of Carlisle v. Graham*, 85 Pa. St. 91; 27 Am. Rep. 628; *Chicopee Bank v. Philadelphia Bank*, 8 Wall. 641; *Mansfield Bank v. Zent*, 39 Ohio St. 105.

The most familiar excuse for the loss of securities and other special deposits is that they were taken by thieves or burglars or embezzled by some officer or agent of the bank. But if it is shown that the bank was entered by armed burglars, and its deposits carried away, no liability is established against it, there being no collusion between it and the criminals, and nothing in the circumstances of the case to indicate negligence on its part in inciting or aiding the commission of the crime: *Wylie v. Northampton Bank*, 119 U. S. 361, 370; 15 Fed. Rep. 428. The bank may, therefore, always relieve itself from liability by proving that a special deposit was taken from its possession by some criminal act for which it is not answerable and in respect to which it has not been negligent. The fact that it took the same care of the deposit as of its own property of like character is undoubtedly evidence of its good faith, and if to this is added evidence that it took the same care as ordinarily prudent persons would have taken under the same circumstances, the defense is complete: *Griffith v. Zipperwick*, 28 Ohio St. 388; *Pattison v. Syracuse Bank*, 80 N. Y. 82; 36 Am. Rep. 582. As was said in an English case involving this question, "It is clear, according to the authorities, that the bank in this case was not bound to more than ordinary care of the deposit intrusted to them, and that the negligence for which they alone could be made liable would have been the want of that ordinary care and diligence which men of common prudence exercise about their own affairs. . . . It may be admitted to be sufficient to exempt a gratuitous bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence, but there is no case which puts the duty of a bailee of this kind higher than this, that he is bound to take the same care of the property intrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of like description": *Giblin v. McMullin*, 2 L. R. P. C. 317; 38 L. J. P. O. 25; *Doorman v. Jenkins*, 2 Ad. & E. 258; *Griffith v. Zipperwick*, 28 Ohio St. 388.

If an Officer or Agent of a Bank Embezzles or Otherwise Misappropriates a special deposit, he is not regarded, in so doing, as representing the bank, and therefore it is not answerable for the loss resulting to the owner of the property unless it has been negligent either in the selection or retention of the defaulting officer or agent, or in so conducting its business as to afford him special opportunities to do the wrongful act of which he has been guilty, as where it had reason to believe that he was speculating and using moneys of which his own means could not give him command, or there has been a failure to exercise proper supervision over him, and the securities have been left in such a position that he could take them without any other officer of the bank having any knowledge of their absence. Some of the earlier cases have, perhaps, exonerated banks losing special deposits through the theft or misappropriation of their officers under circumstances so extreme as to have justified a finding on the part of the jury or the court of the absence of reasonable care, and in this respect may have gone farther than the more recent decisions countenance. But of the general rule, that a bank is not answerable for the theft or embezzlement of special deposits by its agents or officers in the absence of negligence on its part, there is no doubt: *Foster v. Essex Bank*, 17 Mass. 479; 9 Am. Dec. 168; *Giblin v. McMullen*, 2 L. R. P. C. 317; *Scott v. National Bank*, 72 Pa. St. 471; 13 Am. Rep. 711; *Merchants' Nat. Bank v. Guilmartin*, 88 Ga. 797. The rule and its exceptions are well stated in the case last cited in the following extract from the opinion of the court:

“The bank may be guilty of negligence, and liable accordingly, in employing or retaining an unfit person in the position of cashier. But when it does its full duty in selecting a proper person, and in not disregarding indications of dishonesty which ought to arouse suspicion and investigation, then it is not responsible to one who has obtained from it the favor of barely keeping specific property without recompense though the cashier steal the property so put in his charge. The law, as disclosed by the authorities, seems to consider that, in the case of a gratuitous special deposit there is consideration enough in the bare custody of the property to insure its being kept without gross negligence, but not enough to bind the bank as an absolute insurer of its servant's honesty. The depositor contemplates, of course, and consents that the cashier, or some other agent, is to be the personal guardian of the deposit. If the bank has selected and continues him in office, with due regard to the immense interests confided to him, his defalcation is a risk assumed by such a depositor. The bank being equally liable to suffer by the same kind of misfeasance thus evinces *prima facie* its good faith in having the wrongdoer in the service. As far as the question of mere negligence is concerned, the bank can plead its not knowing or having cause to suspect the integrity of its officer. But it has been strongly urged that the bank, as master, is liable for the fraud of the cashier, its servant, in the course of its business. This is the point of most difficulty. Every bailee is bound to exercise good faith, and abstain from fraud in keeping the property. Bad faith is at least as bad as gross negligence, and entails as much liability. The application of this is easy where the very person to whom the property was intrusted is guilty of the fraud. But suppose the master, being the bailee, is personally blameless, and his servant is the guilty one, shall the master be held liable? At common law there was once some authority that the master was not liable for the unauthorized willful tort, which, of course, included fraud of his servant. But the better view is that the master is liable for every tort by the servant which is within his authority or is committed in the prosecution and within the scope of the business. It is often hard to draw the line between torts within, and torts without, the master's business. On the question now to be decided, the cases hold that the act of the cashier by which he appropriates exclusively to himself a gratuitous special deposit in the bank, is not an act done in the bank's business and within the scope of his employment. The custody of the deposit implies no act to be done, but only a mere continuance of possession until a return of the property is demanded. The cashier had nothing to do about it except to suffer it to remain in a safe place of deposit. Consequently in taking it to himself, he is said to ‘step aside’ from his employment to do an act for his personal gain, regardless of the business for which he is engaged. Such an act is lacking both in the rendition of, and in the intent to render, any service to the employer. The cashier does not, as a matter of fact, act with the bank's authority, and furthermore does not essay, or even profess, to act in its behalf. He represents nobody but himself. He throws off all allegiance to his master, and takes the part of a common enemy to all concerned. He becomes the same as a stranger from without, who by robbery, burglary, or stealth deprives the bank of a special deposit, and the authorities hold that the bank is not chargeable with such a loss, in the absence of gross negligence, but is liable if grossly negligent: *Griffith v. Zipperwick*, 28 Ohio St. 388; *Hale v. Rawalle*, 8 Kan. 136; *Levy v. Pike*, 25 La. Ann. 630; *First Nat. Bank v. Graham*, 79 Pa. St. 106; 21 Am. Rep. 49,

100 U. S. 699; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; 19 Am. Rep. 181; *Wylie v. Northampton Nat. Bank*, 119 U. S. 361; *Whitney v. First Nat. Bank*, 55 Vt. 155; 45 Am. Rep. 598; *Schermer v. Neurath*, 54 Md. 491; 39 Am. Rep. 397. Such a fraud by a well-selected servant, duly supervised, is not to be imputed to the bank as its own fraud. The bank cannot be said to have stolen when there is on its part no participation in the theft, no appropriation, and no intent to appropriate the property. Of course if the bank derive profit or benefit from its servant's speculation it is liable: *United Society v. Underwood*, 9 Bush. 609; *First Nat. Bank v. Dunbar*, 118 Ill. 625. No case has been found which holds the bank liable because the defaulting cashier was acting in the prosecution and within the scope of the bank's business when he appropriated the deposit, but such liability when affirmed is rested specifically upon the existence of gross negligence: *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82; 36 Am. Rep. 582; *Preston v. Prather*, 137 U. S. 604."

A bank, however, cannot take any advantage from the wrongful act of its agent, nor acquire by such act any title to the securities on the ground that it did not know that they were held on special deposit. Therefore if he gives a note to the bank and deposits as collateral security therefor coupons and bonds transferable by delivery which had been received by him in his official capacity, to be kept by the bank on special deposit, it cannot defend against the true owner on the ground that it had accepted such securities as collateral without any notice of their ownership and believing them to belong to the cashier: *Fisher v. Bank of New Jersey*, 48 N. J. L. 390; 57 Am. Rep. 561.

The cases in which banks have been sought to be held answerable for the delivery of special deposits to a person not entitled to receive them are infrequent. If such wrongful delivery is due to any act or omission of the owner of the property, he must bear the consequence of his own folly. If he has caused a card to be written directing the property to be delivered to the bearer, the bank is not answerable for such delivery, though the card was stolen or was taken from the person of the owner without his knowledge and while he was unconscious: *Fink v. Germania Nat. Bank*, 40 La. Ann. 820. If a deposit was made by an agent, he will be presumed to have authority to withdraw it, and the bank is not liable for surrendering the property to him: *Walker v. Manhattan Bank*, 25 Fed. Rep. 247. On the other hand, if the delivery is not to the person making the deposit but to a person exhibiting no right thereto, the bank is liable, though it may have acted in good faith, as where it delivered to a husband property deposited by and belonging to his wife, to whom it issued its receipt: *Ganley v. Troy City Nat. Bank*, 98 N. Y. 487. A deposit of bonds was made with a bank by a stranger, it retaining a minute list thereof, and inclosing the bonds in an envelope. Subsequently, another person came to the bank, and, representing himself to be the depositor, demanded the bonds, giving a correct description of them, and specifying accurately the name and address of the owner. The bonds were thereupon delivered to him, and an action was afterwards brought against the bank for their loss. The jury were told that it was for them to say whether the act of the defendants in the delivery or giving up of the bonds was, under the circumstances, negligence, and want of ordinary care, skill, and caution, and that if it was, the defendants were responsible, and a verdict having been returned and judgment entered in favor of the plaintiffs, such judgment was affirmed upon appeal: *Lancaster County Bank v. Smith*, 62 Pa. St. 47.

Of the skill, care, and diligence required of bankers undertaking to act in other capacities than those hereinbefore considered we know of no direct authority other than the principal case. It is doubtless competent for bankers, whether private or incorporated, to undertake to act as investment agencies (*Ward v. Johnson*, 95 Ill. 215) and to participate in many other transactions as agents of persons for whom they undertake to act either gratuitously or for an agreed consideration. When so acting they are bound at least to the same degree of care and diligence as other persons assuming to perform, and representing themselves to be competent to perform, similar duties. If a loss occurs through their joint negligence, and that of the person employing them, his contributory negligence is an adequate defense to any action brought to recover damages sustained by him. Thus, where a person made an inquiry of a bank as to whether L. was an honorable man, and received a reply that it did not know him, and thereupon a man entered the bank claiming to be L., and stated that he expected a conveyance to be sent there for him to execute, and the original inquirer, on being informed that a man was in the bank claiming to be L., and representing that he expected a deed, sent the deed to the bank with a sum of money to be paid L. on its execution, and the bank thereupon, after the execution of said deed, paid over the money to the man. It was held not to be answerable, on the discovery being made that the person was not L., but an impostor, because the answer made by the bank indicated that it did not know L., and nothing afterwards occurred showing that it professed to have any knowledge of the identity of the person claiming to be L., and that what plaintiff did was more likely to have deceived the bank as to such identity than otherwise, and that it was the plaintiff's own negligence that led to his loss: *Metzger v. Franklin Bank*, 119 Ind. 359. The principal case may justly be regarded as a pioneer in its line. The rules there laid down, as we understand them, are just and reasonable and properly guard the interests both of the banker and of his customer. They maintain, in effect, that his entering upon any business fairly within the line of his occupation amounts to a representation on his part that he possesses and will exercise the skill possessed and exercised by reasonably prudent men in the management of like business undertakings and under similar circumstances; that in the case of a loss he must assume the burden of proving that it did not result from his failure to employ ordinary skill and knowledge adequate to the undertaking; that he may establish his good faith by proving that he gave to plaintiff's business the same care that he gave to his own; and finally, that he may relieve himself from the presumption of negligence by proving that other men engaged in the same business, in the same place, and under similar circumstances, and not deficient in common prudence nor in the skill and knowledge usually employed in like undertakings, have been deceived as he has been deceived, and have thereby been the cause of loss either to themselves or to their client: *Isham v. Post*, 141 N. Y. 100; 38 Am. St. Rep. 766. In reaching these conclusions the court did not profess to be guided by prior adjudications directly in point, and we believe there were none by which it could have been so guided. The results announced commend themselves to us, even in the absence of all authority, as being sound upon principle and as imposing upon bankers such degree of care and skill as every customer must reasonably expect them to possess and exercise when intrusting them with business with which they profess, or may be presumed, to be familiar, and, on the other hand, to exact of bankers no higher degree of care and skill than may fairly be presumed to be possessed by men of common prudence

whose duty it is to conduct important financial transactions at the great centers of trade and commerce, in which they must reasonably expect to be required to protect their customers from fraud and imposition, as well as to exercise ordinary financial sagacity in respect to the investments which they recommend and undertake to promote.

PEOPLE v. EWER.

[141 NEW YORK, 129.]

CONSTITUTIONAL LAW.—THE POLICE POWER OF THE STATE extends in the direction of so regulating the use of private property, or of so restraining personal action, as manifestly to secure, or to tend to the comfort, prosperity, or protection of the community.

CONSTITUTIONAL LAW—PARENT AND CHILD.—BY PREVENTING THE EXHIBITION OF CHILDREN OF TENDER AND IMMATURE AGE upon the theatrical or other public stage, the legislature is exercising that right of supervision and control of children which in every civilized state inheres in the government, and which nothing in the relation of parent and child should be deemed to forbid.

CONSTITUTIONAL LAW.—A STATUTE FORBIDDING THE EXHIBITION OR EMPLOYMENT OF A FEMALE CHILD apparently, or actually, under the age of sixteen years, either as a dancer or in any theatrical exhibition, or in any exhibition dangerous to the health, limb, life, or morals of the child, and making a violation of such statute a misdemeanor, is a constitutional and valid exercise of the police power of the state.

PROCEEDING by *habeas corpus* to obtain the release from imprisonment of a mother, who had been convicted of exhibiting her child as a dancer at a theater in violation of a statute forbidding the exhibition at a theater of any female child apparently, or actually, under sixteen years of age. The statute was sustained in the lower court, and the prisoner remanded.

A. J. Dittenhoefer, for the appellant.

Elbridge T. Gerry, for the respondent.

¹³¹ GRAY, J. The question we shall determine upon this appeal is, whether the statute, under which the appellant was arrested, violates any just and personal rights secured to her by the constitution of the state. If it is such an interference with the legal relation of parent and child as exceeds the limits within which the legislature, exercising the sovereign power of the state, may regulate and control that relation, then it is the duty of the courts to declare its unconstitutionality. But if it is within a proper and legitimate exercise of legislative functions, the courts may not interfere. This ques-

tion falls within those which are classified under the head of the police power of the state. The extent of the exercise of that power, with which the legislature is invested, and which it has so ¹²² freely exerted in many directions, within constitutional limits, is a matter resting in discretion—to be guided by the wisdom of the people's representatives. It is difficult, if not impossible, to define the police power of a state; or, under recent judicial decisions, to say where the constitutional boundaries limiting its exercise are to be fixed. It is a power essential to be conceded to the state, in the interest and for the welfare of its citizens. We may say of it that when its operation is in the direction of so regulating a use of private property, or of so restraining personal action, as manifestly to secure, or to tend to the comfort, prosperity, or protection of the community, no constitutional guaranty is violated, and the legislative authority is not transcended. But the legislation must have some relation to these ends; for, to quote the expressions of Mr. Justice Field in the *Slaughter House cases*, 16 Wall. 36, “under the mere guise of police regulations personal rights and private property cannot be arbitrarily invaded.” In *People v. King*, 110 N. Y. 418; 6 Am. St. Rep. 389, it was well observed by Judge Andrews: “By means of this power, the legislature exercises a supervision over matters affecting the common weal. . . . It may be exerted whenever necessary to secure the peace, good order, health, morals, and general welfare of the community, and the propriety of its exercise, within constitutional limits, is purely a matter of legislative discretion, with which courts cannot interfere.” The assumption of the exercise of this extraordinary and very necessary power has been the subject of severe criticism in the opinions of judges, when it has been sought thereby to regulate and control in the interest of the public the conduct of corporate or individual business transactions. *Munn v. Illinois*, 94 U. S. 113, may be referred to as starting a current of authority in this country. But no such criticism can find just grounds for caviling at legislation, whose ends clearly tend to promote the health or moral well-being of the members of society. To that class of legislation this statute belongs. By preventing the exhibition of children of tender and immature age upon the theatrical, or other public, stage, the legislature is exercising that ¹²³ right of supervision and control over the child, which, in every civilized state, inheres in the government, and which nothing

in the legal relations of parent and child should be deemed to forbid.

The proposition is indisputable that the custody of the child by the parent is within legislative regulation. The parent, by natural law, is entitled to the custody and care of the child, and, as its natural guardian, is held to the performance of certain duties. To society, organized as a state, it is a matter of paramount interest that the child shall be cared for, and that the duties of support and education be performed by, the parent or guardian, in order that the child shall become a healthful and useful member of the community. It has been well remarked that the better organized and trained the race, the better it is prepared for holding its own. Hence it is that laws are enacted looking to the compulsory education by parents of their children, and to their punishment for cruel treatment, and which limit and regulate the employment of children in the factory and the workshop, to prevent injury from excessive labor. It is not, and cannot be, disputed, that the interest which the state has in the physical, moral, and intellectual well-being of its members warrants the implication and the exercise of every just power which will result in preparing the child in future life to support itself, to serve the state, and, in all the relations and duties of adult life, to perform well and capably its part.

In the brief of the able counsel who appears for the people, and whose earnest efforts in behalf of the cause of humanity and of mercy have so distinguished him, the discussion of the subject upon these lines is quite full and interesting. Indeed the learned counsel for the appellant does not in the main contest the right and the duty of the state to protect and to promote by adequate legislation the health and morals of its citizens, but bases his arguments here upon the proposition substantially that the legislature cannot take from parents the right to employ their children in any lawful occupation not indecent or immoral, or dangerous to life, limb, health, or morals. That proposition may be readily conceded. It is ¹³⁴ true enough that if the court could say that this legislation was an arbitrary exercise of the legislative power depriving the parent of a right to a legitimate use of his child's services; that while ostensibly for the promotion of the well-being of children, in reality it strikes at an inalienable right, or at the personal liberty of the citizen, and but remotely concerned the interests of the community, it would be its

duty to so pronounce, and to declare its invalidity. But this legislation has no such destructive effect or tendency. It does not deprive the parent of the child's custody, nor does it abridge any just rights. It interferes to prevent the public exhibition of children under a certain age in spectacles or performances, which, by reason of the place or hour, of the nature of the acts demanded of the child performer, and of the surroundings and circumstances of the exhibition, are deemed by the legislature prejudicial to the physical, mental, or moral well-being of the child, and hence to the interests of the state itself. Take the facts of this case, and they seem sufficiently to warrant the interference of the law. It is not necessary to reason upon them. The scanty dress of the ballet dancer, the pirouetting, and the various other described movements with the limbs and the vocal efforts cannot be said to be without possible prejudice to the physical condition of the child; while in the glare of the footlights, the tinsel surroundings, and the incense of popular applause, it is not impossible that the immature mind should contract such unreal views of existence as to unfit it for the stern realities and exactions of later life. The statute is not to be construed as applying only when the exhibition offends against morals or decency, or endangers life or limb by what is required of the child actor. Its application is to all public exhibitions or shows. That any and all such shall be deemed prejudicial to the interests of the child, and contrary to the policy of the state to permit, was for the legislature to consider and to say.

The right to personal liberty is not infringed upon because the law imposes limitations or restraints upon the exercise of the faculties with which the child may be more or less exceptionally ¹³⁵ endowed.

The inalienable right of the child, or adult, to pursue a trade is indisputable; but it must be not only one which is lawful, but which, as to the child of immature years, the state, or sovereign, as *parens patriæ*, recognizes as proper and safe. It is not the strict moralist's view, dictated by prejudice, but the view from the standpoint of a member of the body politic, which ranges the judgment in support of legislative interference to restrain the parent from permitting an employment of the child under circumstances deemed unsuited to its proper mental, moral, or physical development. In the judgment of the legislature it was deemed as unsuitable for the youth of

the community, under a certain age, to dance or to perform in public exhibitions in the ways mentioned, as it was deemed unsuitable for them to work in the factory, except under certain limitations as to age, hours, etc.

We have not overlooked certain cases, referred to by the appellant's counsel, to show the invalidity of this legislation as an exercise of the police power of the state; or to show a violation of constitutional rights. They establish that the legislature has no right, under the guise of protecting health or morals to enact laws which, bearing but remotely, if at all, upon these matters of public concern, deprive the citizen of the right to pursue a lawful occupation: Such were the *Matter of Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377; 52 Am. Rep. 34; *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465; *People v. Rosenberg*, 138 N. Y. 410.

We are referred to some cases in Illinois; but they are neither applicable nor authoritative upon the question before us.

Further discussion is unnecessary. We might have remained satisfied with the able and clear exposition of his views by the learned justice at the special term, had not the range taken by the arguments of counsel seemed to call for a brief expression by us of our view of the principle of state interference.

The order should be affirmed.

All concur.

Order affirmed.

CONSTITUTIONAL LAW—POLICE POWER, TO WHAT EXTENDS.—The police power of a state extends to all regulations affecting the lives, limbs, health, comfort, good order, morals, peace, and safety of society: *State v. Heine-mann*, 80 Wis. 253; 27 Am. St. Rep. 34, and note; *Crane-fordville v. Braden*, 130 Ind. 149; 30 Am. St. Rep. 214; *Town Council v. Pressley*, 33 S. C. 56; 26 Am. St. Rep. 659. See, also, the notes to *Charleston v. Werner*, 37 Am. St. Rep. 782; *Ex parte Whitwell*, 35 Am. St. Rep. 163, and the extended note to *Butler v. Chambers*, 1 Am. St. Rep. 644.

PEOPLE v. WELCH.

[141 NEW YORK, 266.]

JURISDICTION.—A STATE MAY EXERCISE JURISDICTION OVER NAVIGABLE WATERS WITHIN ITS LIMITS, and subject persons and property thereon to the civil and criminal jurisdiction of its courts, in the absence of any prohibition in the national constitution or laws.

CONSTITUTIONAL LAW—JURISDICTION OF STATE COURTS, WHEN EXCLUDED BY THE ACTION OF CONGRESS.—Wherever it is within the power of Congress to legislate, it is competent for it to exclude the jurisdiction of the state courts in respect to all subjects over which legislative action is authorized. To exclude the jurisdiction of the state courts over matters within their ordinary jurisdiction, the intention of Congress to exercise this power should be distinctly manifested, and the legislation relied upon should be clear and unambiguous. There must be express words of exclusion or a manifest repugnancy to the exercise of state authority over the subject.

CONSTITUTIONAL LAW.—An act of Congress declaring that every person employed on any steamboat or vessel, by whose misconduct, or negligence, or inattention to his duties on such vessel the life of any person shall be destroyed, shall be deemed guilty of manslaughter, is within the power of Congress, under the grant to it of the power to regulate commerce with foreign nations and among the several states, and the grant of judicial power in cases of admiralty and maritime jurisdiction.

CONSTITUTIONAL LAW—JURISDICTION.—THE POWER TO REGULATE COMMERCE extends to the persons who conduct navigation, as well as to the instruments used, and the courts of the United States may be invested by Congress with jurisdiction over offenses committed upon the waters within the admiralty jurisdiction.

CONSTITUTIONAL LAW.—THE POWER TO ENACT RULES UPON A SPECIFIC SUBJECT INCLUDES the power to enforce penalties for their violation.

JURISDICTION.—THE STATES DO NOT ENFORCE THE CRIMINAL LAWS OF THE UNITED STATES.

CRIMINAL LAW—JURISDICTION CONCURRENT IN THE STATE AND NATIONAL COURTS.—An act of Congress making punishable as manslaughter the commission on vessels of certain acts already constituting that crime by the common law, and by the law of the state, does not exclude the jurisdiction of the state courts, to punish the offense under the state laws.

CRIMINAL LAW.—THE SAME ACT MAY BE AN OFFENSE BOTH AGAINST THE STATE AND THE UNITED STATES, and punishable in each jurisdiction under its laws.

PROSECUTION and conviction of the defendant for the crime of manslaughter in the second degree.

Lorenzo Semple, for the appellant.

John D. Lindsay, for the respondent.

260 ANDREWS, C. J. The defendant was convicted, at the court of general sessions held in and for the city and county of New York, of the crime of manslaughter in the second de-

gree, upon an indictment charging him with having, on the 15th of June, 1891, upon the Hudson river in said city and county, feloniously and willfully propelled and forced the steam tugboat F. W. De Voe, upon which he then was, against the yacht Amelia, on which was one Francis Jackson, thereby forcing the said Francis Jackson into the river, and causing his death by drowning. The record contains an agreed statement of the facts proved, in substance, that the defendant Welch was duly licensed to act as a second-class pilot on steam vessels by the United States local board of inspectors of steam vessels for the district of New York; that while said license was in full force, and while the defendant was engaged in the actual performance of his duties as pilot under said license, a collision occurred June 15, 1891, on the Hudson river in the county of New York, between the steam towboat on which the defendant was employed, and which at the time was under his control and management as pilot, and the sloop yacht Amelia, which collision was caused by the willful misconduct, negligence, and inattention to his duties on said F. W. De Voe, of the defendant; that said collision so caused resulted in the sinking of the yacht Amelia, and in the destruction of the life of Francis Jackson, who was at the time on board of the yacht, by drowning.

The sole question presented on this appeal is as to the jurisdiction of a state court to entertain jurisdiction of the offense established by the evidence, the claim in behalf of the defendant being that the federal courts have exclusive jurisdiction of the offense of which he was convicted. Section 5344 of the United States Revised Statutes is as follows: "Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, inspector, or other public officer through whose fraud, connivance, misconduct, or violation of law the life of any person shall be destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof, before any circuit court of the United States, shall be sentenced to confinement at hard labor for a period of not more than ten years."

It is plain that the circumstances found bring the case within this section. The defendant was a licensed pilot. He was in charge of the steam tugboat as pilot at the time of the

collision. The collision which resulted in the death of Jackson was caused by the misconduct, negligence, and inattention to his duties of the defendant, and, moreover, his misconduct was, as the jury found, willful, an element which does not seem to be necessary to constitute the crime defined in the statutes of the United States. In the consideration of the question of the jurisdiction of the state court, there are certain indisputable propositions which it is important to bear in mind. The Hudson river is within the territory of the state of New York, and is subject to its legislative jurisdiction. The criminal laws of the state apply to offenses committed on the waters of the river, whether above or below the ebb and flow of the tide, to the same extent as to like offenses committed upon the land, except in so far as the laws of Congress, under the constitution of the United States, have asserted an exclusive jurisdiction. In *United States v. Bevens*, 3 Wheat. 336, the defendant had been indicted and convicted of murder ²⁷¹ in the United States court of Massachusetts, committed on board of a man of war of the United States, in Boston harbor, he being at the time a marine on the vessel.

The conviction was reversed by the supreme court of the United States on the ground that the place where the murder was committed was within the territorial limits of Massachusetts, and that as no law of Congress had made a murder within the territorial jurisdiction of a state, on tidewater or elsewhere, an offense against the United States, the state court alone had jurisdiction. In *Smith v. Maryland*, 18 How. 71, Mr. Justice Curtis, referring to the grant of admiralty and maritime jurisdiction in the United States constitution, said: "We consider it to have been settled by this court, in *United States v. Bevens*, 3 Wheat. 363, that this clause in the constitution did not affect the jurisdiction nor the legislative power of a state over so much of their territory that lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or the laws of the United States." The rights of a state to exercise jurisdiction over navigable waters within its limits, and to subject persons and property thereon to the civil and criminal jurisdiction of its courts, in the absence of any prohibition in the federal constitution or laws, has passed unchallenged, and is an undoubted incident of sovereignty.

Another proposition, also beyond question, is that the crime of which the defendant was convicted is one defined by a

statute of the state of New York, and that independently of any statute the facts established the crime of manslaughter at common law. The Revised Statutes, after defining the crime of murder and what shall constitute the crime of manslaughter in the higher degrees, proceeded to declare: "Every other killing of a human being by the act, procurement, or culpable negligence of another, where such killing is not justifiable or excusable, or is not declared in the act to be murder or manslaughter of some other degree, shall be deemed manslaughter in the fourth degree": 2 Rev. Stats., 662, sec. 19. It is scarcely necessary to cite authorities to show that the statute above ²⁷² quoted was simply declaratory of the rule of common law that a killing of a human being by culpable negligence is manslaughter: Wharton's Criminal Law, secs. 361-365, and cases cited. The courts of this state, on the adoption of the state constitution of 1777, became vested with the jurisdiction over offenses cognizable at common law, and this jurisdiction is unimpaired and in full force except in so far as it has been modified by state legislation, or was surrendered to the United States by the federal constitution, or has been taken away by act of Congress lawfully enacted in execution of the powers conferred by that instrument. It is an accepted canon in the construction of powers granted to the general government by the federal constitution that state authority existing when the constitution was adopted is not excluded by the mere grant of similar powers to Congress. The powers granted by the federal constitution are not exclusive, unless made so in terms, or prohibited to the states, or are incompatible with the exercise of a concurrent jurisdiction. But the principle has been grafted upon the subject that although powers conferred by the constitution upon Congress are not in terms or in their nature exclusive of the power of the states, they may be made so by national legislation excluding the jurisdiction of the states in the particular matter, although within their original and antecedent authority. In *Martin v. Hunter*, 1 Wheat. 304, Judge Story, referring to the judicial power of the United States, said: "It is manifest that the judicial power of the United States is unavoidably in some cases exclusive of all state authority, and in all others may be made so at the election of Congress." The Judiciary Act of 1789 (1 U. S. Stats. at Large, c. 20) was framed upon this construction of the power of Congress, and the jurisdiction of the courts of the United States was in some

cases made exclusive, and in others the jurisdiction of the state courts not being in terms excluded, was left unaffected and was concurrent with the courts of the union as to matters over which the state courts could, by their own powers and constitution, exercise jurisdiction. A distinction has been ²⁷² suggested as to the power of Congress to make the jurisdiction of the United States courts exclusive between cases in which the state courts had jurisdiction antecedent to the adoption of the constitution, and those where the right involved or the liability incurred arises exclusively under a law of Congress, and without which it would have had no existence: See Curtis on Constitution, sec. 141. But the recent cases of *The Moses Taylor*, 4 Wall. 411, and *Clafin v. Houseman*, 93 U. S. 130, seem to be adverse to the distinction suggested, and to hold that it is competent for Congress to exclude the jurisdiction of the state court in respect of all subjects upon which Congress may legislate.

In *The Moses Taylor*, 4 Wall. 411, it seemed to be conceded that the proceeding there under review was a matter as to which the original states through their courts could have exercised jurisdiction antecedent to the adoption of the federal constitution, and the decision was placed on the ground that the jurisdiction was excluded by force of the ninth section of the Judiciary Act of 1789, and vested exclusively in the district courts of the United States: See 1 Kent's Commentaries, 400. But it is obvious that to exclude the jurisdiction of the state courts over matters within their ordinary jurisdiction, the intention of Congress to exercise this power should be distinctly manifested, and that the legislation relied upon to deprive the state courts of jurisdiction should be clear and unambiguous. There can be no presumption that state authority is excluded from the mere fact that Congress has legislated. There must be express words of exclusion, or a manifest repugnancy in the exercise of state authority over the subject: See Curtis on Constitution, section 121.

It must, we think, be conceded that section 5344 of the Revised Statutes of the United States was in its general purpose and enactment within the power of Congress, under the constitutional grant of power to "regulate commerce with foreign nations and among the several states" (Art. 1, sec. 8), and the grant of judicial power in cases of "admiralty and maritime jurisdiction" (Art. 3, sec. 1), and the authority vested ²⁷⁴ in Congress "to make all laws which shall be

necessary and proper for carrying into execution" the powers vested in Congress by the constitution (Art. 1, sec. 8, subd. 17). The Hudson river is within the admiralty jurisdiction of the United States: *The Genesee Chief v. Fitzhugh*, 12 How. 443. The power to regulate commerce extends to the persons who conduct navigation as well as to the instruments used, and the United States courts may be invested by Congress with jurisdiction over offenses committed upon waters within the admiralty jurisdiction: *Cooley v. Port Wardens of Philadelphia*, 12 How. 299; *United States v. Coombs*, 12 Pet. 72; Curtis on Constitution, sec. 47. The legislation of which section 5344 is the culmination had its origin in the act of Congress of July 7, 1838 (5 U. S. Stats. at Large, p. 304), entitled, "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam." It was extended by the act of February 28, 1871 (16 U. S. Stats. at Large, p. 456, sec. 57), and the provision in its present form was enacted in the revision of 1873, and forms section 5344 of title 70 of the United States Revised Statutes, entitled, "Crimes." The power of Congress to enact rules for the government of vessels on waters within the admiralty jurisdiction; to prescribe the qualifications and duties of captains, pilots, and other persons employed thereon; to supervise the construction of steam vessels, with a view to secure the safety of passengers and others; to require licenses to be obtained by those engaged in navigation, and the inspection of steam boilers at recurring intervals, has been exercised without challenge, and a large body of rules covering these and cognate subjects have been enacted by Congress, or under its authority, and are to be found in the Revised Statutes of the United States. The power to enact rules on a specified subject carries the power to enforce penalties for their violation. The primary purpose of section 5344 was to secure, by criminal sanctions, the observance by owners, officers, employees of vessels, inspectors and other public officers, of the duties imposed upon them in connection with the business of navigation for the security of ²⁷⁵ human life. Whether the section has, as is claimed, a broader application than is justified by the power of Congress, we deem it unnecessary to consider. We have no doubt that, as applied to licensed officers or pilots, the enactment does not transcend its power.

It remains to consider whether the offense defined in the section is exclusively punishable in the courts of the United

States. The states do not enforce the criminal laws of the United States: *United States v. Lathrop*, 17 Johns. 4. The state in punishing the defendant is not enforcing a statute of the United States. It is enforcing its own laws, which had an existence coeval with the formation of the state constitution. The crime of which the defendant was convicted was primarily a crime against the peace and good order of the state. It was only a crime against the United States, because Congress, in the interest of navigation, had seen fit to enact a law making one species of homicide, when committed by an officer, pilot, etc., manslaughter, punishable in the courts of the United States. There is nothing in the enactment itself which makes the jurisdiction exclusive. There is no repugnancy in the existence of concurrent jurisdiction in the state courts to punish under its laws this grade of homicide. The jurisdiction of the United States courts is not exclusive unless there is found elsewhere in the legislation of Congress provisions of clear and unmistakable import, taking away the jurisdiction of the courts of the state. The principle that Congress may lawfully exclude the jurisdiction of the state courts of offenses punishable under federal statutes was first applied by section 11 of the Judiciary Act of 1789, which declared that the circuit courts of the United States shall have "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides or the laws of the United States shall otherwise direct." The jurisdiction of the state courts to punish under state laws offenses which are cognizable by the circuit courts of the United States was made by this section to depend upon affirmative legislation by Congress ²⁷⁶ giving the state courts concurrent jurisdiction. Subsequent to the act of 1789 laws were passed by Congress punishing the counterfeiting of the current coin of the United States and the uttering of the same: Laws of 1806, c. 49; Laws of 1807, c. 75; Laws of 1816, c. 44; Laws of 1825, c. 65. These acts contain the following provision: "And be it further enacted that nothing in this act contained shall be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states, over offenses made punishable by this act." In 1847 the question whether the courts of Ohio could entertain jurisdiction under the laws of that state of the offense of passing counterfeit current coin of the United States came before the supreme court of the United States in

the case of *Fox v. State of Ohio*, 5 How. 410, upon writ of error, after the conviction of the defendant in the state court of that offense. It was urged that the proviso in the federal statutes above referred to did not affect the exclusive jurisdiction of the United States courts under section 11 of the Judiciary Act of 1789. The supreme court sustained the jurisdiction of the state court, and the decision necessarily adjudged that the proviso in these statutes was a law of the United States, excepting cases of passing counterfeit coin from the clause in the act of 1789, giving exclusive jurisdiction to the United States courts of offenses cognizable under the laws of the United States. Mr. Justice Washington, in *Houston v. Moore*, 5 Wheat. 26, gave the same construction to the proviso in the acts referred to. The case of *United States v. Marigold*, 9 How. 560, brought into question the jurisdiction of the courts of the United States to punish the crime of passing counterfeit coin under the federal statute, and in this case also the jurisdiction was affirmed. The two cases of *Fox v. State of Ohio*, 5 How. 410, and *United States v. Marigold*, 9 How. 560, established the proposition that the same act may be an offense both against the state and the United States, and punishable in each jurisdiction under its laws. The same principle has been declared in other cases: *Moore v. Illinois*, 14 How. 13; Chief ²⁷⁷ Justice Taney, *United States v. Amy*, July, 1859, 4 Quart. Law J. 163; *Ex parte Siebold*, 100 U. S. 371.

Section 5328 of the United States Revised Statutes, which is one of the general provisions of title 70, entitled "Crimes," declares: "Sec. 5328. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof." Later on in this title is section 5344, making the misconduct, negligence, or inattention to his duties of a captain, pilot, etc., manslaughter. The provision as to exclusive jurisdiction contained in section 11 of the Judiciary Act of 1789 is incorporated in substance into the United States Revised Statutes in the twentieth subdivision of section 629, which declares that the circuit courts of the United States shall have "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it may be otherwise provided by law."

If the question of the jurisdiction of the state courts in the present case depends solely upon the construction of the

clause in section 629, just quoted, and of section 5328 of the United States Revised Statutes, there could be little ground, under the decisions of the supreme court of the United States, construing the proviso in the counterfeiting acts, for denying such jurisdiction. Section 5328 is in legal effect a re-enactment of the proviso in those acts applicable to the crimes mentioned in title 70 of the Revised Statutes of the United States. The proviso in the counterfeiting acts was held to withdraw the crimes therein mentioned from the operation of the 11th section of the Judiciary Act of 1789, and to create an exception to the general rule declared in that section, excluding the jurisdiction of the state courts of offenses cognizable in the courts of the United States. The same construction, applied to section 5328, would make the jurisdiction of the state courts of the offense now in question concurrent. But the confusion and uncertainty attending the subject is produced by another section of the Revised Statutes of the United States, first enacted at the time of the revision, being section 711. That section declares: "The jurisdiction vested in the courts ²⁷⁸ of the United States in the cases hereinafter mentioned shall be exclusive of the courts of the several states: First, of all crimes and offenses cognizable under the laws of the United States." Construing this section upon its language alone, and without reference to the other sections mentioned, it would exclude the jurisdiction of the state courts over the offense of manslaughter committed by a pilot or other person employed on vessels, under the circumstances mentioned in section 5344. If such construction is imperatively required, it would result in the apparent anomaly of leaving to the state courts jurisdiction of the crime of murder committed on board of a vessel on navigable waters within the territory of the state, whether by an officer, pilot, or other person, and depriving them of jurisdiction of the crime of manslaughter, defined in section 5344. If the defendant had murdered Jackson, the state court would have had undoubted jurisdiction of the crime. Manslaughter is one of the grades of criminal homicide. Can it be reasonably supposed that Congress, by an act which was primarily intended to enforce the observance, by persons engaged in navigation, of the rules it had established for the security of life and property, intended further to oust the jurisdiction of the state courts over one grade of the offense of manslaughter, of which they before had undoubted jurisdiction, and where the offense, whether

committed by a pilot or any other person, was primarily an offense against the state? It was made an offense against the United States also, by reason of the relation in which the offender stood to the United States, under its rules and regulations, which he was bound to observe. We think section 5328 must be construed as exempting from the operation of section 711 the cases specified in title 70, which were also offenses punishable under the laws of the several states. Under section 711, the states could not enforce the criminal statutes of the United States, as was attempted in substance under the law of Pennsylvania, involved in *Houston v. Moore*, 5 Wheat. 7. Nor, under section 711, could a state make an act criminal and punishable in its courts, which in its nature was an offense only, because made so by a ²⁷⁹ law of Congress.

Section 5328 may perhaps be construed as confining the concurrent jurisdiction of the state courts, of offenses specified in title 70, to such offenses as were such under the laws of the states existing when that section was enacted, leaving the section to operate to prevent future legislation by the states concerning the crimes mentioned in that title, not before cognizable under state laws. But whatever may be the true construction of that section, to give it the broad application claimed, would, we think, ignore the true scope or meaning of section 5328, interpreted in the light of the previous decisions of the supreme court of the United States. We are not satisfied with the view taken in some of the circuit and district courts of the United States, that section 5328 was intended merely to permit a state court to punish a different offense involved in the same act. Such a distinction is very difficult to apply, and it grafts on the section a qualification of its general language. Many of the crimes specified in title 70 are, in their nature, exclusively offenses against the United States. Such offenses are withdrawn from state jurisdiction, because they are not, and cannot be, offenses against a state. We have seen that where the exercise of state authority is incompatible with the exercise of federal authority granted by the constitution of the United States, the state authority is superseded without express words. This principle applies as well to judicial as to legislative powers: *Federalist*, No. 82, by Hamilton. It was upon this principle, as we understand, that it was held by the supreme court of the United States (*In re Loney*, 134 U. S. 872) that a state court had no jurisdiction to punish perjury,

committed in a contested election case, of a member of the house of representatives, under a proceeding regulated by a law of the United States. The learned justice who delivered the opinion in that case, after stating that the power of punishing a witness for perjury in a judicial proceeding belongs peculiarly to the government in whose tribunals the proceeding was had, said: "It is essential to the impartial and efficient administration of justice in the tribunals of the nation, that witnesses ²⁸⁰ should be able to testify freely before them, unrestrained by legislation of the state, or by fear of punishment in the state courts. The administration of justice in the national tribunals would be greatly embarrassed and impeded," etc. The cases of *People v. Fonda*, 62 Mich. 401, and *Commonwealth v. Felton*, 101 Mass. 204, held that the State courts have no jurisdiction of the crime of embezzlement by an officer of a national bank of the funds of such bank. It is sufficient to say that the offense of embezzlement, under the national bank acts, was subject to the provisions of section 11 of the Judiciary Act, and is not one of the crimes exempted from its operation by section 5328 of the Revised Statutes of the United States. The contention that section 711 excludes the state courts from jurisdiction of all crimes enumerated in title 70, if sustained, takes from the state courts the power to punish the passing of counterfeit money of the United States, a convenient jurisdiction which they have exercised from the commencement, and which, as was assumed by Mr. Justice Gray, in the case *In re Loney*, 134 U. S. 372, still exists.

Upon the whole case we are of opinion that the state court had jurisdiction to punish the defendant for the crime proved. Its jurisdiction has not, we think, been taken away by the legislation of Congress. It would be a more satisfactory state of this law than now exists if it could be held that the court first acquiring jurisdiction should retain it, and that the judgment of one court in such a case as this could be pleaded in bar of a further prosecution for substantially the same offense in the courts of the other jurisdiction.

The judgment and conviction should be affirmed.

All concur.

Judgment affirmed.

JURISDICTION OVER NAVIGABLE WATERS WITHIN STATE LIMITS.—Admiralty jurisdiction, under the Judiciary Act of 1789, extends to the public

rivers of the United States, and to all public waters capable of being navigated by maritime or commercial vessels: *Walters v. Steamboat Mollie Dozier*, 24 Iowa, 192; 95 Am. Dec. 722, and note; *Steamer Petrel v. Dumont*, 28 Ohio St. 602; 22 Am. Rep. 397. Admiralty jurisdiction comprehends navigable rivers as high up as the tide ebbs and flows, although it should be within the body of a county: *Baker v. Hoag*, 7 N. Y. 555; 59 Am. Dec. 431. Upon the lakes the admiralty jurisdiction is not exclusive, but concurrent with that of the state courts over remedies given by state laws: *Thorsen v. Schooner J. B. Martin*, 26 Wis. 488; 7 Am. Rep. 91. See, further, the extended notes to *Miller v. Mendenhall*, 19 Am. St. Rep. 228, and especially to *Cass v. Woolley*, 32 Am. Dec. 65-68.

JURISDICTION.—POWER OF CONGRESS TO CONFER EXCLUSIVE JURISDICTION upon federal courts is discussed in the extended note to *People v. Wemple*, 27 Am. St. Rep. 547, 550.

PUNISHMENT.—The power to pass a law carries as an incident the power to enforce its observance by some reasonable penalty: *Mayor etc. v. Ywillk*, 8 Ala. 137; 36 Am. Dec. 441. This question is fully discussed in the extended note to *Robinson v. Mayor*, 34 Am. Dec. 640.

MINOR v. BEVERIDGE.

[141 NEW YORK, 899.]

BROKER—DAMAGES FOR UNAUTHORIZED SALE.—If a broker sells stocks of his customer without giving due notice of the sale, he does not, thereby as a matter of law, extinguish all claim against the customer for advances made, but the customer is entitled to be allowed as damages the difference between the price for which the stock was sold, and for which he received credit, and its market price then or within such reasonable time after a notice of sale as would have enabled him to replace the stock in case the market price exceeded the price realized.

A BROKER DOES NOT, BY SELLING STOCKS WITHOUT GIVING DUE NOTICE OF THE SALE, forfeit his right to recover advances made by him on their purchase. The unauthorized sale merely entitles the customer to recover damages sustained thereby, and for the purpose of diminishing such damages, or showing that no damages whatever were suffered, evidence is admissible to prove that the stocks might have been repurchased in the open market, within the next fifteen days after the sale, below the price realized thereat.

George W. Wingate and Max Stern, for the appellant.

Eugene L. Bushe, for the respondent.

401 **BARTLETT, J.** The plaintiff, as assignee for the benefit of creditors of P. W. Gallaudet & Co., stock brokers, sued the defendant to recover a balance alleged to be due from her on a speculative account which she had with Gallaudet & Co. at the time of their failure, November 10, 1890.

The cause was brought on for trial at a circuit court in the

city of New York, and at the close of plaintiff's case the complaint was dismissed, and the exceptions ordered to be heard in the first instance at the general term. The general term ⁴⁰² overruled the exceptions and ordered judgment for defendant, dismissing complaint, with costs. The plaintiff appeals from that judgment.

The question presented is whether the trial judge was justified in taking the case from the jury. The defendant's contention is that P. W. Gallaudet & Co. sold the stocks held in her account without notice, and for that reason their assignee cannot recover. The plaintiff insists that demand and notice were duly given to defendant through her son, as her agent, before sale of the stocks, and that she is bound thereby; and even if there was a sale without notice the defendant can only be allowed her actual damages in reduction of plaintiff's claim. The evidence shows that Alven Beveridge, the son of the defendant, was the son-in-law of P. W. Gallaudet, and from the year 1881 to November 10, 1890, the day when the firm of P. W. Gallaudet & Co. failed, was a clerk of said firm; that on the 30th of May, 1881, the defendant, represented by her son, opened a speculative account with the firm which, with additions and charges made therein, remained open until the day of the failure.

Our examination of the record satisfies us there is a conflict of evidence as to whether or not Alven Beveridge was the agent and representative of his mother, and accustomed for the nine years and more covered by her account to receive the statements, demands, and notices to which she was entitled, including the demand and notice in this action.

We are of opinion that the trial judge erred in not submitting to the jury, as requested, the question of notice, and whether it was reasonable and legal under the circumstances.

The plaintiff's counsel insists that he was entitled to submit still another question to the jury.

There was evidence in the case tending to show that the stocks sold for defendant's account on the tenth day of November, 1890, could have been repurchased in the open market within the next fifteen days below the prices realized upon the sale.

The plaintiff's counsel asked to go to the jury as to whether ⁴⁰³ the defendant sustained loss by reason of said sale, and as to whether the defendant could not have replaced the stocks at the same price, or less price, than that for which

they were sold, and within a reasonable time after the sale.

This request was refused. We think the trial judge should have submitted these questions to the jury under the settled law of this court that even where a stockbroker sells without due notice stock purchased by him for a customer, on a margin, and held in pledge to secure the advance made by him for the purchase, he does not thereby, as matter of law, extinguish all claim against the customer for the advance, but the customer is entitled to be allowed as damages the difference between the price for which the stock sold and for which he received credit, and its market price then, or within such reasonable time after notice of sale as would have enabled him to replace the stock in case the market price exceeded the price realized: *Gruman v. Smith*, 81 N. Y. 25; *Capron v. Thompson*, 86 N. Y. 418-420; *Colt v. Owens*, 90 N. Y. 368-371; *Porter v. Wormser*, 94 N. Y. 431-446; *Wright v. Bank of the Metropolis*, 110 N. Y. 237-246; 6 Am. St. Rep. 356.

The defendant's counsel relies on *Gillett v. Whiting*, 120 N. Y. 402, decided by the second division of this court in June, 1890, as sustaining this last ruling of the trial judge. We are of opinion that the point actually decided in that case does not affect the cases in this court to which we have already referred.

In *Gillett v. Whiting*, 120 N. Y. 402, the plaintiffs were stockbrokers, and brought the action to recover a balance alleged to be due on account of stock transactions between the parties.

In submitting the case to the jury the defendant's counsel requested the court to charge that in case the plaintiffs sold the stock without notice to the defendant as to the time and place of sale, by doing so they violated their duty to the defendant, and converted the stock to their own use.

The court refused to so charge, the defendant excepted, and the jury found a verdict for the plaintiff.

The sole question presented on the appeal was defendant's ~~404~~ right to have the jury charged that a sale of his stocks by the broker without notice was a conversion.

The second division of this court very properly held that the judge should have so charged the jury, and reversed the judgment. The effect of the conversion, if found by the jury, was not presented on the appeal.

The remarks, therefore, of the court as to the effect upon plaintiff's cause of action, if conversion of the stocks should be established, were *obiter*.

The cases we have cited were neither referred to in the briefs of counsel nor the opinion of the court.

The judgment appealed from is reversed, new trial granted, with costs to abide event.

All concur.

Judgment reversed.

BROKERS—COMMISSIONS ON UNAUTHORIZED SALES.—A broker is entitled to his fees when he negotiates a contract different from that prescribed by his employer, which is ratified: *Gilder v. Davis*, 137 N. Y. 504; *Smith v. Schiele*, 93 Cal. 144. See the extended note to *Walker v. Osgood*, 93 Am. Dec. 172. To entitle a broker to commissions there must be an employment, and his services must be the efficient cause of the bargain: *Earp v. Cummins*, 54 Pa. St. 394; 93 Am. Dec. 718. A sale of stock by the broker, under an ordinary contract for the speculative purchase of stock, without notice to the customer of the time and place of the sale, is a conversion: *Baker v. Drake*, 66 N. Y. 518; 23 Am. Rep. 80. For an extended discussion of the relation of stockbroker and principal see the note to *Horton v. Morgan*, 75 Am. Dec. 313; and for a discussion of unauthorized sales by brokers, and the effect of ratification thereof, see *Gillett v. Whiting*, 141 N. Y. 71, *ante*, p. 762, and note.

RUSSELL v. McCALL.

[141 NEW YORK, 437.]

PARTNERSHIP.—A SURVIVING PARTNER HAS THE LEGAL TITLE TO THE ASSETS OF THE FIRM, and holds them as the legal owner, and not as trustee in the strict sense of that term. In equity, however, he is to be regarded to some extent as a trustee, and his duty is to pay the debts and dispose of the assets of the partnership for the benefit of himself and the estate of his deceased partner.

PARTNERSHIP.—A SURVIVING PARTNER MISAPPROPRIATING THE ASSETS OF THE FIRM, AND CONVERTING THEM TO HIS OWN USE, is so far guilty of a breach of trust that a court of equity will, when called upon, intervene and give appropriate relief.

JUDGMENT—MERGER.—A JUDGMENT AGAINST A SURVIVING PARTNER, in favor of the representative of the deceased partner in a suit for an accounting, does not constitute any defense to any suit against other wrongdoers, who, by intermeddling with the property and assets of the estate, have rendered themselves liable as trustees *de son tort* for the wrong done.

A JUDGMENT AGAINST A SURVIVING PARTNER WHICH HAS NOT BEEN SATISFIED does not bar further efforts to obtain relief against other wrongdoers.

JUDGMENT—MERGER.—A JUDGMENT FOR THE CONVERSION OF A CHATTEL DOES NOT, BEFORE ITS SATISFACTION, change the title to the property, nor bar an action against any other wrongdoer.

ELECTION BETWEEN REMEDIES—MAINTAINING AN ACTION AGAINST A SURVIVING PARTNER FOR AN ACCOUNTING, and recovering a personal judgment against him for the amount found to be due, furnishes no evidence

of an election between inconsistent remedies, to the extent of protecting other wrongdoers from the consequences of their wrong.

A JUDGMENT AGAINST ONE OF SEVERAL JOINT DEBTORS MERGES the original debt into the higher security of the judgment, and no action can thereafter be maintained against any of the other debtors, even though no satisfaction is received of the judgment.

A JUDGMENT AGAINST ONE OF SEVERAL WRONGDOERS UNSATISFIED is not a bar to the maintenance of an action against the others.

JUDGMENT—MERGER.—A JUDGMENT AGAINST A SURVIVING PARTNER for a sum found to be due from him to the representatives of his deceased copartner does not make the partnership assets the absolute property of the survivor, free from any duty on his part regarding them, nor does it vest in him the legal right to convert those assets and apply them to his own use, or to transfer them to a mere volunteer free from all liability to the estate of the deceased partner. Until such judgment is satisfied, the surviving partner has no further or larger right to the assets than he had before it was entered.

ELECTION.—PURSUING ONE OF SEVERAL WRONGDOERS is not an election to pursue them severally, so that thereafter no joint action can be had against them—at least, this objection will not be sustained when made by one who has never before been sued.

TRUSTEE DE SON TORT.—One who, knowing that property is held by a surviving partner, and is assets of a late firm, and who with such partner takes such property and applies it to their own uses, should be treated as a trustee *de son tort*, and held answerable in an equitable action.

ONE OF SEVERAL WRONGDOERS IS LIABLE TO THE FULL AMOUNT of a conversion or misappropriation in which he has participated.

PARTNERSHIP.—THE REPRESENTATIVE OF A DECEASED PARTNER SUING A PERSON guilty of taking and misappropriating the assets of a firm is entitled to recover the full amount, regardless of any sum due from the partnership to a third person, or to one of the parties to the suit, and for which the defendant, against whom the judgment is entered, is not answerable.

IF SEPARATE JUDGMENTS HAVE BEEN OBTAINED AGAINST TWO WRONGDOERS for the same wrong, the satisfaction of either satisfies the other, except as to costs.

ACTION by the executrix of a deceased copartner against the surviving partner individually, and as receiver of the firm, and also against other parties, who, it was claimed, had joined in the conversion or misappropriation of the property of the firm. Schamu M. Moschowitz and Miss Russell were partners in the dressmaking business in the city of New York at and for some time prior to her death, which occurred in February, 1880. She died testate, appointing her sister executrix of her will. The surviving partner remained in possession of the property, and continued the business until about May 1, 1880, at which time the assets of the late firm, over and above all liabilities, amounted to fifty-one thousand dollars. These liabilities were all paid, except a claim made

against the firm by Herman Moschcowitz. At the date last named Schamu M. Moschcowitz and James McCall formed a partnership for carrying on the same business in which the old firm had been engaged, and their assets consisted solely of the assets and goodwill of the late firm. These copartners proceeded to use the assets of the old firm, and never paid any part thereof to the representatives of the deceased partner. In January, 1881, Herman Moschcowitz also became a partner, and the firm thus formed continued in business with the capital and goodwill possessed by the old firm. In February, 1882, McCall brought an action to wind up the affairs of the last-named partnership, in which action Schamu M. Moschcowitz was appointed the receiver, and a judgment was entered and the receiver sold the assets, realizing about seven thousand dollars, which were deposited with a trust company. In October, 1880, the executrix of Miss Russell commenced an action against Schamu M. Moschcowitz, as surviving partner, for an accounting, and a personal judgment was entered against him in such action for a small sum, which judgment has never been satisfied or complied with in any respect, and the amount thereof was not finally settled until a judgment was entered by the general term in October, 1886, modifying the judgment as entered by the trial court. In 1888 the executrix of Miss Russell commenced the present action. The defendants pleaded in this action the judgment in the former action against Schamu M. Moschcowitz, as well as other defenses which need not here be mentioned; and the defendant, Herman Moschcowitz, also averred a claim in his favor against the original copartnership. It was found, by the trial court, that if any claim existed in Herman's favor McCall was in no event liable therefor, and judgment was finally entered in this action in favor of the plaintiff, and against McCall, for the amount of the share of the assets of the old firm due the plaintiff, with interest and cost; but no personal judgment was taken against Schamu M. Moschcowitz, nor was any judgment given against his brother Herman. The defendant McCall appealed, and the general term reversed the judgment, and thereupon plaintiff appealed to this court.

Peter A. Hendrick, for the appellant.

George Hoadly, Barclay E. V. McCarty, and Henry L. Scheuerman, for the respondent.

⁴⁴⁶ PECKHAM, J. The judgment which the plaintiff obtained in this action at special term is here assailed by the counsel for the defendant, Mrs. McCall, upon several grounds that will be alluded to in their order.

1. The defendant claims that the executrix of Miss Russell, by commencing her action against the surviving partner to recover the decedent's share of the partnership assets and in prosecuting the same to judgment, is barred from suing the surviving partner again, and joining with him Mrs. McCall upon the same cause of action. It is now asserted by counsel for defendant McCall that when the other action was commenced the executrix knew all the facts connecting McCall with the misuse or misappropriation of the assets of the partnership. The special term did not find that she was ignorant, and on the other hand it refused the defendant's request to find that she had at that time full knowledge of these facts. The general term said that it could not be found, in view of the plaintiff's allegations in the suit against the surviving partner, that she was ignorant of his misappropriation of the assets when she commenced her suit against him, and yet (the court says), in the face of such allegations in her complaint, the plaintiff took a personal judgment against the survivor for the value of her share therein, the result of which the court holds was to bar the plaintiff from impeaching the title of any one who came into possession of the assets through the surviving partner. Whichever way the fact might be determined we think it is immaterial in this ⁴⁴⁷ case, and for the further discussion of this point we will assume full knowledge on the part of the executrix of all the facts at the time she commenced her action against the survivor. In that case we think there was no election of inconsistent remedies such as should bar this action.

Upon the death of Miss Russell the surviving partner, Moschcowitz, had certain powers, rights, and obligations granted to and placed upon him by reason of such death. He had the legal title to the assets, and he held them as the legal owner, and not as trustee in the strict sense of that term. In equity, however, he was to be regarded to some extent as a trustee, and his duty was to pay the debts and dispose of the assets of the partnership for the benefit of himself and the estate of the deceased partner: *Cass v. Abeel*, 1 Paige, 393; *Williams v. Whedon*, 109 N. Y. 333; 4 Am. St. Rep. 460; *Preston v. Fitch*, 137 N. Y. 41, 56. The position is

somewhat anomalous, not exactly and wholly a trustee, and yet not a full owner of the assets which he takes or retains possession of by reason of survivorship. The duties spoken of he owes the estate of the deceased partner, and when, instead of gathering in the assets, paying the debts, winding up the business, and distributing the surplus, he misappropriates the same and converts them to his own use and that of others with him, he is so far guilty of a breach of trust that a court of equity will, when called upon, intervene and give appropriate relief.

This was the object of the first action. The court was asked to decree an accounting, and as a ground for the request it was alleged that the defendant was violating his duty, converting the assets to his own use in his own business, and failing to apply them to the payment of the debts of the partnership. Judgment was asked for the amount which might be found due upon such accounting. In all this there was nothing inconsistent with the cause of action set forth in the complaint now under review. Even in equitable actions of account, it frequently, if not generally, results that a pure and simple money judgment will be entered against the defendant. The inquiry by means of an account is proceeded with, and the result being ⁴⁴⁸ determined, if it show an amount due the plaintiff, a judgment therefor may properly be entered: 1 Pomeroy's Equity Jurisprudence, third clause, secs. 110, 140; 3 Pomeroy's Equity Jurisprudence, sec. 1421. But this kind of a judgment is not in the least inconsistent with the right to pursue other wrongdoers, who, by intermeddling with the property and assets of the estate, have rendered themselves liable as trustees *de son tort* for the wrong done: 1 Perry on Trusts, sec. 245; *Flockton v. Bunning*, reported in note to *Vyse v. Foster*, L. R. 8 Ch. App. 309 at 323; Lindley on Partnership, 531.

The survivor of the partnership did not become the full and absolute owner of its assets upon the entry of the personal judgment against him, nor was there any election on the part of the plaintiff by reason of that fact to look only to the one wrongdoer when there were others equally liable. If the personal judgment were paid, then indeed the plaintiff's rights and equities in the property would be changed, and he would be precluded from any further claim upon it. Until satisfaction of that judgment, however, the plaintiff could not be barred from further efforts to obtain relief against

other wrongdoers. Even in an action of trover for the conversion of a chattel, a judgment unsatisfied does not change the title to the property, and is no bar to an action against any one of the other wrongdoers: *Osterhout v. Roberts*, 8 Cow. 43; *Sessions v. Johnson*, 95 U. S. 347, 349. And by subsequently suing other wrongdoers who had wrongfully interfered with the property, it is not a following of trust funds into other property in which they have been invested, within the rule on that subject, as claimed by defendant's counsel, and of which *Ferris v. Van Vechten*, 73 N. Y. 113, is an example. There is no inconsistency in holding the trustee personally responsible, and also pursuing other wrongdoers and seeking relief against them as trustees *de son tort* by way of damages for the same wrong.

It is true that one cannot recover the purchase price of land and the land too. If one choose to hold his trustee for the amount of the price he received for trust property wrongfully sold, it may well be that the plaintiff thereby affirms the sale, ⁴⁴⁹ and seeks to recover the price. This is no such case. The plaintiff does not seek to hold the property which has been substituted in place of trust funds, and to hold the trustee also. There has been no substitution of trust property, but the funds themselves have been converted by the survivor and others to their own use, and the plaintiff asks to recover damages for that wrong. Because the survivor was proceeded against alone, and a personal judgment recovered against him, which has not been satisfied, furnishes no evidence of an election of inconsistent remedies to the extent of freeing the other wrongdoers from the consequences of their wrong.

The cases cited by defendant's counsel, of which *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 10 Am. St. Rep. 479, and *Terry v. Munger*, 121 N. Y. 161, 18 Am. St. Rep. 803, are examples, are not in point. In the former action the plaintiff, by commencing his action against the person to whom the defendant bank had paid the money, affirmed the validity of the payment and sought to recover its amount from him. After failing to recover the amount on a judgment entered against him, the plaintiff then commenced his action against the bank, and sought to recover from it on the ground that the bank had never made a valid payment of its debt. We held the plaintiff had made an election to consider the payment made by the bank to the third person as a valid

payment of such debt so far as the bank was concerned, and the plaintiff ratified it by commencing the suit.

In *Terry v. Munger*, 121 N. Y. 161, 18 Am. St. Rep. 803, the owner of the property elected to treat its conversion as a sale, and commenced his action accordingly. It was held he could not thereafter commence an action against others in which his cause of action was founded upon the conversion instead of the sale of the same property upon the same occasion and in the same transaction. In all the cases cited there is an element of inconsistency involved in which the plaintiff seeks to occupy with reference to the same transaction and upon the same facts, a position which is antagonistic with one already taken by him. I can see none such in this case. He took no position, proved no fact, asked for no relief in the first case which is in any way inconsistent ⁴⁵⁰ with the position he now assumes, unless it be said that the recovery of the personal judgment has effected this great change. For the reasons already given, I do not think it has.

The failure to have a receiver appointed in the first suit is, as it seems to me, immaterial. The point is that no absolute right to these assets, freed from any duty with regard to them, was ever transferred to the surviving partner by reason of the mere entry of this personal judgment so long as it remained unsatisfied. Nor are the other defendants absolved by any such reason from answering to the plaintiff for what would otherwise be a conceded wrong. No cause of action against them for such a wrong was waived or in any wise affected by the plaintiff's effort to recover the value of the assets which the survivor had misappropriated, or shared with others in misappropriating. It was simply a separate proceeding against one wrongdoer, and no satisfaction.

In this case the survivor has in fact never transferred the assets to others. He has simply shared with others in the misappropriation of the firm assets, and I can see no principle upon which a proceeding against one of the wrongdoers should be regarded as an election to dismiss the others from all liability arising out of the same wrong. Under these circumstances the defendant can obtain no consolation from the entry of that judgment.

2. The defendant also objects that the plaintiff's right of action was merged in the judgment recovered against the surviving partner.

Where there is a joint indebtedness (not a joint and several)

a judgment recovered against one of two or more joint debtors merges the original debt in the higher security of the judgment, and no action can thereafter be maintained against any of the other defendants, even though no satisfaction is received of the judgment against the one debtor: *King v. Hoare*, 13 Mees. & W. 494; *Olmstead v. Webster*, 8 N. Y. 413; *Candee v. Smith*, 93 N. Y. 349, 352, and cases cited; *Mason v. Eldred*, 6 Wall. 231. But a judgment against one wrongdoer unsatisfied is not a bar to the maintenance of an action against the ⁴⁵¹ others: *Livingston v. Bishop*, 1 Johns. 290; 3 Am. Dec. 330; *Osterhout v. Roberts*, 8 Cow. 43; *Lovejoy v. Murray*, 3 Wall. 1, where Mr. Justice Miller reviews the cases; *Sessions v. Johnson*, 95 U. S. 347, 348. By taking judgment against the survivor the plaintiff did not make the partnership assets the absolute property of the survivor free from any duty on his part regarding them. Nor did he thereby vest in such survivor a legal right to convert those assets and apply them to his own use, or to transfer them to a mere volunteer free from all liability to the estate of the deceased partner. Until the judgment against the surviving partner was satisfied he took no further or greater right to the assets than he had before. Of course, as survivor and originally he could sell or mortgage them or otherwise dispose of them for the purpose of paying the debts and winding up the affairs of the partnership and making distribution of the surplus, but I think the entry of the judgment gave him no greater rights over the assets of the partnership than he had before. Satisfaction of the judgment was necessary for that result.

3. The defendant also objects that even if the parties were all wrongdoers in such manner as to render them jointly and severally liable, then the judgment against Schamu M. Moschowitz, one of the wrongdoers, is a bar to an action against all of them on the ground that pursuing one of the parties severally is an election to sever the joint liability, and it cannot be revived. Counsel cites *Sessions v. Johnson*, 95 U. S. 347, Daniel on Negotiable Instruments, sec. 1296, and Story on Bills, sec. 428, as authority for his contention, and he urges that this is a matter which the party who has not before been sued can take advantage of, because the plaintiff has elected a different remedy which operates as a general bar to the maintenance of the action.

The principle claimed is applied in the two above-cited works upon negotiable paper to contracts of a joint and sev-

eral nature, while in the case of *Sessions v. Johnson*, 95 U. S. 347, the court, in deciding another matter, asserts the principle that a party who sued any one of several wrongdoers and had ⁴⁵² judgment, could not afterwards seek his remedy in a joint action against all, because the prior judgment against one was in contemplation of law an election on his part to pursue his several remedy. Where there is a joint and several contract it is held that the plaintiff may sue jointly or severally, but he cannot do both, and the pendency of one suit may be pleaded in abatement of the other. In such case there is, it is said, an election as to which character of the expressed contractual obligation the party will enforce: *Ex parte Rowlandson*, 3 P. Wms. 405; 5 Robinson's Practice, 823. In the P. Williams case above cited it is stated in a note (page 405) that if three are bound jointly and severally the obligee cannot sue two of them jointly, for this is suing them neither jointly nor severally. In regard to the liabilities of joint and several tort feors the law is not so clear. I think there is a radical difference in principle between a joint and several obligation evidenced by an expressed contract or arising by implication from the facts proved, and a joint and several liability on the part of several tort feors. A joint and several obligation based on a note, bond, or other written contract, or one arising out of an implied contract, is a well-known kind of obligation, and its legal meaning has come to be that each one is liable to a separate suit, or that all are liable to a joint suit, and in no other way can they be held. This is known as part of the obligation they entered into. But a joint and several liability, arising out of a particular wrong having been done the plaintiff by several wrongdoers, is not so precisely limited. Thus Cooley says that in such case more than one and less than all may be sued: Cooley on Torts, 133. And in suing less than all it is not an election to take one of two remedies which the defendants have by their contract consented to give the plaintiff his choice of, but have not consented to give both. It is the pursuit of certain of the wrongdoers who are in any event liable, and if unsuccessful in obtaining satisfaction, the right remains to pursue others, although in each case the defendants chosen may have been more than one and less than all the wrongdoers, ⁴⁵² and so the remedy may have been strictly neither joint nor several, as that term is applied to cases of joint and several contractors. Hence when subsequent to

the first action, the plaintiff commences one against all of the wrongdoers, he has not lost the right to maintain it by reason of an election to waive such a remedy, but he has lost it only as against those whom he has already sued, and he has lost it in their case only for the reason that he has no right to vex them twice for the same cause of action. The parties who have not been already sued cannot take advantage of this ground as a defense on their part. As to them the plaintiff has made no election of remedies, and their liability remains unaffected.

I think the objection to maintaining the joint action ought to be held personal to the one who has already been sued and against whom judgment has already been obtained. His objection is pertinent, he has once already been proceeded against, and judgment has gone against him, and he ought not to be again vexed for the same cause. I have found no case where the objection has been made and allowed in favor of a defendant who had not before been sued. I see no reason why it should be. He has not been harmed in any conceivable way, nor his interests or defenses in the least degree jeopardized.

In this case, the trial resulted in a judgment against the defendant McCall only, who was not before sued. The trial court refused to give a further judgment against the survivor in the partnership. It was in effect the same as if there had been a discontinuance as against that defendant. I do not understand the defendant to question the proposition that a plaintiff can pursue the several wrongdoers separately, although while obtaining several judgments he can have but one satisfaction. So here, if he had pursued McCall alone subsequent to the judgment against the survivor, such action, so far as this point is concerned, could be maintained. The course pursued is the same as a discontinuance, and I think that would be in effect the same as if the action had not been brought against the party in regard to whom a discontinuance⁴⁵⁴ was entered. That McCall by taking this property, and applying it, with the surviving partner, to his own uses, with knowledge of its character, and without paying any consideration therefor, can be properly treated as a wrongdoer and trustee *de son tort*, and be made liable in an equitable action for his acts, is, as it seems to me, undoubted: *Vyse v. Foster*, L. R. 8 Ch. App. 309; *Flockton v. Bunning*, note to above case, at page 323; *Perry on Trusts*, section 245; *Hooley v.*

Cleve, 9 Abb. N. C. 8; *In re Jordan*, 2 Fed. Rep. 319; 2 Pomeroy's Equity Jurisprudence, 1079. Although the party sued the second time in this action did, by his answer, take the objection that no further judgment ought to be entered against him, yet as none was entered he has no further cause of complaint, and he took no appeal from the judgment that was entered herein against McCall. As to McCall, we think the judgment was a proper one so far as this point is concerned.

4. The objection that plaintiff is only entitled in any event to recover the balance over and above the amount which was ordered to be deposited by the court in the other action to meet the possible claim of Herman Moschoowitz, and which balance is only about three hundred dollars, cannot prevail. Herman is a party to this suit, and it has been found that in no event is the estate of McCall liable to him for any portion of his claim against the old firm, and Herman has not appealed. That amount cannot be properly deducted from the amount of McCall's liability for the value of the share of the estate of the deceased partner, which came into the hands of the firm, and was converted to his use. Each one of several wrongdoers is liable for the full amount of the conversion or misappropriation: *Attorney General v. Wilson*, 1 Craig & P. 1; *Cunningham v. Pell*, 5 Paige, 607; 2 Pomeroy's Equity Jurisprudence, note at end of section 1081.

By this judgment there is no danger of the defendant's estate being made liable to pay a second time. McCall's estate stands in no position as surety for any creditors of the original firm. It is found that the estate of McCall owes a certain sum to plaintiff as payment for one-half the assets of ⁴⁵⁵ the old firm for which the estate is liable. Whether plaintiff, as administrator, will have to pay any thing by way of satisfaction of the debts of the old firm will be known hereafter when Herman endeavors to prove his claim. McCall's estate has no interest in that question, nor has it any in the question whether the individual creditors of Miss Russell, the deceased partner, will be able to obtain payment out of the assets that are to be paid over under this judgment before a creditor of the partnership will be able to do so. These various creditors will enforce what rights they have without any aid from McCall's estate as a volunteer on that subject. It is not to be assumed that any improper or undue preference will be obtained by any one after the McCall estate has made its payment to the plaintiff. A payment under this

judgment will protect all the rights of the estate. And lastly, there are no debts left excepting the claim of Herman, which is disputed.

If this judgment is paid it will satisfy the judgment against Schamu M. Moschcowitz, obtained by this plaintiff, and if that judgment should be paid, it will satisfy this one as to principle and every thing but costs. There is no difficulty in providing for but one payment and a satisfaction of both judgments thereby.

5. The judgment against the surviving partner was not used as evidence against the McCall defendant as to the amount or value of the assets converted. The learned judge held it was conclusive against the plaintiff, but that it was no evidence against defendant as to what the value of the property was, and he said that upon the evidence in the case outside of the judgment he thought the value was greater than had been allowed in the former suit, yet he held the defendant only liable for that amount.

6. There is nothing in this case showing any following of any trust funds or any lien upon their proceeds. If there had been any such, it would in such an action have been to the benefit of the defendant by lessening the amount of a recovery against it by just the amount of the funds identified and obtained. But as to the seven thousand dollars deposited by the receiver ⁴⁵⁶ of Moschcowitz Brothers in the trust company, it appears the expenses were more than enough to eat them up, and no judgment for their payment has been recovered.

7. Nor is the fact that Herman Moschcowitz claims to be a creditor of the old firm while he is one of the defendants charged with this conversion of assets, an answer to the plaintiff's demand. Herman could not, by his illegal interference with these assets, pay his debt, nor had he the right to take possession of the property for that purpose. When the surviving partner violated his duty and was one of the parties that converted the assets of the partnership to his own use, so that judgment was recovered against him for the amount of one-half of the assets after he had deposited in the trust company by the direction of the judgment all that was necessary to meet all the debts of the firm, his further rights as surviving partner ceased. There are no other debts. If, being insolvent, or for any other reason, he has failed to make the deposit as directed by the judgment, he did not after the

judgment was entered have the right to demand from defendant, McCall, any portion of the money which the latter was liable to pay to plaintiff on account of his own wrong in converting the assets of the partnership in connection with the surviving partner. The only debt outstanding is the Herman Moschcowitz claim, which is disputed and which does not appear to be prosecuted as if it had much merit. And it must be upon these facts that the rights of the parties are to be adjudged.

8. The defendant also contends that the plaintiff's complaint should have been dismissed on the ground of inexcusable *laches* in bringing the action. The litigation arising out of the attempt to make the surviving partner responsible for his misconduct was not concluded until the entry of the modified judgment of the general term late in the year 1886, and a short time thereafter the plaintiff probably discovered the ineffectual character of his attempt to redress in that direction. Early in the year 1888 this action was commenced. We think the record discloses reasonable cause for the delay in bringing ⁴⁵⁷ this action, and the plaintiff is not within the principle regarding stale claims invoked by defendant.

9. We think the trial judge committed no error in practice when, under the circumstances, instead of entering an interlocutory judgment and sending it to a referee to inquire whether there was anything left of the seven thousand dollars paid by the receiver over and above the expenses consequent upon its collection, etc., he took the evidence upon that point himself and ordered final judgment in accordance therewith to be entered.

These are the principal grounds urged by respondent for an affirmance of the order of the general term. It is unnecessary to more fully mention the other points, and it is enough to say we do not think them sufficient to reverse the special term judgment.

We have given this case and the very able argument of the counsel for the defendant all the consideration possible, but for the reasons stated we are unable to agree with the conclusion arrived at by the general term. We think on the contrary the learned judge at special term arrived at the correct result, and, therefore, the order of the general term must be reversed and the judgment of the special term affirmed, with costs in the general term and in this court to the appellant here.

All concur.

Ordered accordingly.

PARTNERSHIP—EFFECT OF DISSOLUTION BY DEATH.—The effect of the dissolution of a partnership by death of one of the members is to vest the legal title to the choses in action in the surviving partners: *Egberts v. Wood*, 3 Paige, 517; 24 Am. Dec. 236, and note. On the death of one partner title to the partnership assets vests in the survivor: *Van Kleeck v. Hammell*, 87 Mich. 599; 24 Am. St. Rep. 182, and note.

JUDGMENT—MERGER IN OF ORIGINAL CAUSE OF ACTION.—Where a party recovers a judgment upon an obligation the original cause of action is merged in the judgment: *Butler v. Rockwell*, 17 Col. 290; *Gapen v. Bretternitz*, 31 Neb. 302; *Newman v. Irwin*, 43 La. Ann. 1114; *Stauffer v. Remick*, 87 Kan. 454; *Carr v. Rischer*, 119 N. Y. 117; *Bank of North America v. Wheeler*, 28 Conn. 433; 73 Am. Dec. 683, and note; *Turner v. Plowden*, 5 Gill & J. 52; 23 Am. Dec. 596; *Napier v. Gidiere*, 1 Spear Eq. 215; 40 Am. Dec. 613, and note; *Wann v. McNulty*, 2 Gilm. 355; 43 Am. Dec. 58, and note; *Pike v. McDonald*, 32 Me. 418; 54 Am. Dec. 597; *Barnes v. Gibbs*, 31 N. J. L. 817; 86 Am. Dec. 210, and note. A cause of action is merged in a judgment only when such judgment was rendered upon the identical cause of action between the same parties or their privies: *Cackley v. Smith*, 47 Kan. 642; 27 Am. St. Rep. 311, and note.

TRUSTEE DE SON TORT—WHO IS.—A trustee *de son tort* is he who of his own authority enters into the possession or assumes the management of property which belongs beneficially to another: *Morris v. Joseph*, 1 W. Va. 256; 91 Am. Dec. 396.

JOINT LIABILITY AMONG TORT FEASORS.—A party injured by joint tortfeasors may bring separate suits against them and proceed to judgment in each and no bar arises as to any of them until satisfaction is received: *Dawson v. Schloss*, 93 Cal. 194; *Bloss v. Plymale*, 8 W. Va. 393; 100 Am. Dec. 752, and note. When one has received an actionable injury at the hands of two or more wrongdoers, all are jointly and severally liable to him for the full amount of damages, and the plaintiff has his election to sue all jointly or he may bring his separate action against each or any of them: *Wisconsin etc. R. R. Co. v. Ross*, 142 Ill. 9; 34 Am. St. Rep. 49, and note; *Stanley v. Union Depot Ry. Co.*, 114 Mo. 606; *Chicago v. Babcock*, 143 Ill. 258; *Wolf v. Perryman*, 82 Tex. 112; *Hoosier Stone Co. v. McCain*, 133 Ind. 231; *Belo v. Fuller*, 84 Tex. 450; 31 Am. St. Rep. 75; *Simmons v. Everson*, 124 N. Y. 319; 21 Am. St. Rep. 676, and note.

JOINT LIABILITY AMONG TORT FEASORS—DISCHARGE OF ONE BY SATISFACTION OF DEBT BY OTHER.—When a plaintiff has actually received satisfaction from one of several tortfeasors for the injury he has sustained, the cause of action is discharged as to all: *Seither v. Philadelphia Traction Co.*, 125 Pa. St. 397; 11 Am. St. Rep. 905, and extended note; *State v. Boyce*, 72 Md. 140; 20 Am. St. Rep. 458, and note. See the extended note to *Cartersville v. Cook*, 16 Am. St. Rep. 254. If a creditor accepts the liability of one of several joint debtors in discharge of a joint indebtedness the other debtors are thereby released: *Hard v. Burton*, 62 Vt. 314; or the payment of a note by one of the several joint makers is a discharge of the debt as to all: *Fitch v. Hammer*, 17 Col. 591.

MARONEY v. BOYLE.

[141 NEW YORK, 462.]

A VENDOR'S LIEN IS NOT WAIVED BY TAKING THE INDIVIDUAL NOTE, BOND, OR COVENANT OF THE GRANTEE for the purchase money remaining unpaid, though the grantor relies on the solvency and financial ability of the grantee, and may not rely upon any lien or know that he is entitled to any, and may not have in contemplation the enforcement of any lien at the time when he takes such note or other obligation.

A VENDOR'S LIEN IS NOT ALLOWED TO PREVAIL AGAINST ONE WHO TAKES AN ENCUMBRANCE UPON THE LAND, OR AN INTEREST THEREIN, OR A CONVEYANCE THEREOF, IN GOOD FAITH AND WITHOUT NOTICE OF THE LIEN AND FOR A VALUABLE CONSIDERATION PARTED WITH BEFORE SUCH NOTICE.

EXECUTION SALES.—A PURCHASER AT AN EXECUTION SALE WHO PAYS THE AMOUNT OF HIS BID WITHOUT NOTICE OF A VENDOR'S LIEN against the property purchased, though he receives notice of such lien before he becomes entitled to the sheriff's deed, is not affected by the lien, and it cannot be enforced against him.

ACTION to enforce a lien for the purchase price of land conveyed by the plaintiffs to the defendant Margaret Boyle. The conveyance was made on the 20th of August, 1887, at which time a part of the purchase money was paid and a promissory note given for the payment of the balance. The vendee and maker of the note was at that time solvent, and the plaintiffs relied upon her individual responsibility. She, upon the making of the deed, entered into possession of the property, and thereafter, in September, 1887, for the consideration of two thousand dollars, conveyed the land to the defendant Edward D. Boyle, who immediately entered, and has thence continued in the possession thereof. In April, 1889, and before the commencement of this action, the defendant, F. W. Davis, purchased several judgments from the plaintiffs and other owners thereof and paid in full therefor, which judgments were liens upon the property. There was also a judgment recovered by one Barry, who took out execution thereon, and a sheriff's sale was made thereunder on the 20th of April, 1889, to the defendant Davis for the sum of eighty-six dollars and twelve cents, and a certificate of sale was issued in due form of law. Davis had no notice prior to the issuing of the certificate of the claim of the plaintiffs to a vendor's lien. The complaint was dismissed as to the defendants Margaret Boyle, Baker, and Davis, and the plaintiffs appealed.

C. S. Cary, for the appellants.

E. D. Northrup, for the respondents.

⁴⁶⁷ EARL, J. When Edward D. Boyle took his deed he had notice of the plaintiffs' claim for unpaid purchase money, and, therefore, he did not acquire a better position than his grantor had. We think there can be no doubt that, as against him and his grantor, the plaintiffs had and retained their equitable lien. They took the promissory note of their grantee for the balance of the purchase money. It was not taken as payment, but simply as evidence of the amount due and the time and mode of payment. It has been many times held that the grantor does not waive his equitable lien for the purchase money by simply taking the individual note, bond, or covenant of the grantee. He may rely in taking such an individual obligation upon the solvency and financial ability of the grantee, and he may not know that he has any lien upon the land, or actually rely upon any lien, and he may not have in contemplation the enforcement of the lien at any time, and yet, unless in such a case he expressly and consciously waives his lien, he retains it. If, however, he takes any security for the purchase money, as a mortgage upon the same or other property, or the note or other obligation of a third party, he will be held to have waived his purchase money lien, unless he has in some way expressly retained it: 2 Story's Equity Jurisprudence, secs. 1217 et seq.; 4 Kent's Commentaries, 152; 3 Pomeroy's Equity Jurisprudence, secs. 1249 et seq.; *Mackreth v. Symmons*, 15 Ves. 329; *Bayley v. Greenleaf*, 7 Wheat. 46; *Garson v. Green*, 1 Johns. Ch. ⁴⁶⁸ 308; *Champion v. Brown*, 6 Johns. Ch. 398; 10 Am. Dec. 343; *Shirley v. Sugar Refinery*, 2 Edw. Ch. 505; *Hulett v. Whipple*, 58 Barb. 224; *Hallock v. Smith*, 3 Barb. 267; *Vail v. Foster*, 4 N. Y. 312; *Seymour v. McKinstry*, 106 N. Y. 230.

We find in this record no evidence whatever sufficient in law to show a waiver of their lien by the plaintiffs. It is quite true that they relied upon the personal responsibility of their grantee. That is always so when the grantor takes the mere personal obligation of the grantee for the purchase money of land sold, and yet it has never been held that the personal obligation of the grantee thus taken deprives the grantor of his lien.

The counsel for the respondents makes much of the fact that the note was signed by Mrs. Boyle, attaching to her name "administratrix to the estate of Peter Boyle, deceased." The deed ran to her by the same description, and she deeded to her son by the same description. She, nevertheless, what-

ever may have been supposed at the time, took the deed in her own right, and the note was her personal obligation, and all the plaintiffs got, or intended to get, was the obligation of the real grantee.

We, therefore, think the learned trial judge erred in his finding of fact that the plaintiffs had, either as to Margaret Boyle or her son, waived their lien for the purchase money by any thing which took place at the time of their conveyance of the land. But this error was harmless, as the defendant Davis purchased the land under such circumstances that he has protection against the lien. He purchased the land at the sheriff's sale without any notice of the plaintiffs' lien, and he paid to the sheriff the amount of his bid in money. He took the sheriff's certificate of sale, and since the trial of this action he has received the sheriff's deed, as we are now informed by the production thereof upon the argument here. We will, however, ignore the deed, and treat the case as if Davis held only the certificate.

The examination of many authorities shows that the vendor's lien is not now a favorite with courts of equity, and that ⁴⁶⁹ it has many times been enforced with reluctance and misgivings. Equity judges have found it difficult to find any justifiable basis for it to rest on, and they have differed as to the grounds and reasons for its introduction into the equity jurisprudence of England and of this country. It has been repudiated in some of the states by the courts, and in others it has been abrogated by legislative enactments. It is against the general policy of our law, which looks with disfavor upon secret interests in real estate, and requires generally that titles to real estate shall be created by some writings which shall be spread upon the public records for the protection of those who might trust to titles apparently sound but afflicted with secret infirmities. It generally gives way to a legal interest or to a superior equity, and as it is a matter of purely equitable cognizance it should never be enforced when it would be inequitable to do so. Hence, it is never allowed to prevail against one who takes an encumbrance upon the land, or an interest therein, or a conveyance thereof, in good faith without notice of the lien and for a valuable consideration parted with before such notice.

Now, what is the *status* of Davis holding the sheriff's certificate of sale? Why should he not be protected? Such a purchaser, after he obtains the sheriff's deed, is in the same

position as he would have been if the deed had been executed by the judgment debtor at the time the judgment was docketed. In *Hetsel v. Barber*, 69 N. Y. 1, we said: "A sheriff's deed, given in pursuance of a judgment and a sale upon execution, is treated as if given by the judgment debtor himself. It conveys precisely what he could have conveyed when the judgment was docketed. The sheriff, by authority of law, takes his property and conveys it to satisfy his debt, and the transfer is the same as if the sheriff had in fact acted as the authorized attorney of the debtor. The grantee in such cases holds not under the sheriff, but under the debtor, and the deed, when recorded, is protected by and has the benefit of the Recording Act": See, also, *Freeman on Judgments*, secs. 366, 366 a. Therefore, if Davis had taken the sheriff's deed ⁴⁷⁰ before the trial of this action, he would have had the same protection against the plaintiff's lien as he would have had if he had in good faith and for money paid taken a deed from Mrs. Boyle or her son. But the mere fact that he did not then have the deed can make no difference. The sheriff's certificate must be regarded the same as if at the time of docketing the judgment the debtor had executed a contract of sale embodying the same terms, and had received the full purchase price. The debtor would in that event have held the legal title of the land as trustee for the purchaser. The title of the purchaser would have been contingent and conditional on account of the right of redemption existing in the debtor and his creditors. But, nevertheless, he would have become the purchaser of just such a right and interest as he bargained for and paid to obtain, and he would have had protection against any outstanding secret and unknown lien for the purchase price. We think it is, therefore, clear that by his purchase of the land at the sheriff's sale, and full payment of the purchase price, Davis obtained protection against the plaintiff's lien.

We cannot hold that, as matter of law, there was any thing to give Davis constructive notice of plaintiffs' lien. The form of the deeds to Mrs. Boyle and to her son, and the fact that the deed to the son was not recorded, are of no significance upon the question of notice. They do not suggest the nonpayment of the purchase price to the plaintiffs, or the existence of their lien. The rights of Davis are not affected by the small amount of the purchase price. There was one judgment anterior to that under which he purchased, and he held

several junior judgments, and the whole situation must be taken into account in considering the price paid. It is a significant fact that the interest he purchased was not considered sufficiently valuable to induce any one to redeem from him. Even if he made a good bargain he was entitled to the benefit of it.

The equities of the plaintiffs are not enlarged because Davis made the purchase, expecting thereby in some way to benefit or protect the family of Peter Boyle, deceased. His ⁴⁷¹ position and rights would be the same if he only held the land as security.

To the suggestion made by the learned counsel for the plaintiffs that they could in some way be subrogated to the rights of Davis by payment to him of the amount paid by him, or have the right by the judgment in this action to redeem from him, or that he should be turned over to other property of the judgment debtor for his reimbursement, the plain answer is that the complaint was not framed for such relief, the action was not tried with the view to such relief, and there are no findings or exceptions which present the matter for our consideration.

The defendant Baker appears to have the same defense to the action which Davis has. But we have paid no attention to him as his answer to the complaint does not appear in the record; he was not made a respondent upon this appeal, and no one appeared for him upon the argument before us.

Our conclusion, therefore, is that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

VENDOR'S LIEN—WHEN NOT WAIVED.—A vendor of land does not lose or waive his lien thereon by taking notes from his vendee for the unpaid purchase money: *Dowdy v. Blake*, 50 Ark. 205; 7 Am. St. Rep. 88, and note; *Tiernan v. Beam*, 2 Ohio, 383; 15 Am. Dec. 557, and note; *Aldridge v. Dunn*, 7 Blackf. 249; 41 Am. Dec. 224; *Manly v. Slason*, 21 Vt. 271; 52 Am. Dec. 60, and note; *Baum v. Grigaby*, 21 Cal. 172; 81 Am. Dec. 153, and note; *Plowman v. Riddle*, 14 Ala. 169; 48 Am. Dec. 92, and note; or by taking the bond or personal security of the vendee: *Clower v. Rawlings*, 9 Smedes & M. 122; 47 Am. Dec. 108, and note; or by changing the evidence of indebtedness, or by accepting additional security: *Hitt v. Pickett*, 91 Ky. 644. See, also, the notes to *Burgess v. Fairbanks*, 17 Am. St. Rep. 232; *Bell v. Pelt*, 14 Am. St. Rep. 61, and *Avery v. Clark*, 22 Am. St. Rep. 279, and the extended note to *Schnebly v. Ragan*, 28 Am. Dec. 199.

VENDOR'S LIEN AGAINST BONA FIDE PURCHASER WITHOUT NOTICE.—A vendor's lien will not prevail against a bona fide purchaser without notice: *Lincoln v. Purcell*, 2 Head, 143; 73 Am. Dec. 196; *Kilpatrick v. Kilpatrick*, 23

Miss. 124; 55 Am. Dec. 79, and note; *Blight v. Banks*, 6 T. B. Mon. 192; 17 Am. Dec. 136; *Ellis v. Temple*, 4 Cold. 315; 94 Am. Dec. 200; *Manly v. Sluson*, 21 Vt. 271; 52 Am. Dec. 60, and note; but it will prevail where it is sold with notice: *Mims v. Lockett*, 23 Ga. 237; 68 Am. Dec. 521; *Clower v. Rawlings*, 9 Smedes & M. 122; 47 Am. Dec. 108; *Walton v. Hargroves*, 42 Miss. 18; 97 Am. Dec. 429, and note.

COVERT v. CRANFORD.

[141 NEW YORK, 521.]

WATERS, ACTION FOR DRAINING OFF.—If, by drains, ponds or other waters on the plaintiff's land are lost to him he sustains an actionable damage, and may recover of the party maintaining such drain or other means of draining off such waters.

RIPARIAN PROPRIETORS.—Parties who, while constructing a conduit under a contract with the city, impair the flowing of a stream of water to the injury of a riparian proprietor are liable to him for the damages sustained during the prosecution of their work. The fact that they are acting under the direction of the city cannot excuse them.

CONTRACTORS WHEN NOT LIABLE FOR CONTINUING INJURIES TO RIPARIAN PROPRIETORS.—If contractors by constructing a conduit for a city thereby drain off a pond on the land of a third person, and the operation of the conduit after its construction is to keep draining off such waters, such contractors are not answerable for the damages resulting from the maintenance of the conduit, it being on the lands of the city, of which they have no control, and the draining off of the waters being a result not reasonably to be anticipated from the acts of the contractors.

Jesse Johnson, for the appellant.

Benjamin W. Downing, for the respondent.

524 **ANDREWS, C. J.** The defendants, in the year 1890, under a contract with the city of Brooklyn, constructed a conduit running in an easterly and westerly direction, connecting certain ponds at Massapequa, Long Island, with the Ridgewood reservoir, in aid of the water supply of the city. The conduit line crossed the valley of James brook, a small stream running northerly and southerly, which supplied a pond of the plaintiff on his premises about a mile below the point where the conduit crossed the stream which furnished the water-power for a small mill on the plaintiff's land, which had existed there for more than fifty years. The defendants excavated a trench for the conduit from twelve to twenty-two feet in depth. The evidence tends to show that as the excavation approached the channel of the stream the water in the plaintiff's pond began to lower, and that since its completion the pond has been substantially drained so as to destroy the

water-power, and the plaintiff has suffered a serious injury. In building the conduit across the stream the water was temporarily diverted from the channel. But after the conduit was covered, and the bed of the stream at the point of crossing was restored to its original state, the pond, as has been stated, did not retain the water flowing thereto, and the evidence justifies the inference that the water of the pond passed by underground drainage through the earth into the channel of the conduit and was thus lost to the plaintiff. It has been held that such an injury is actionable. In *Dickinson v. Grand Junction Canal Co.*, 7 Ex. 282, the defendant sunk a well on its premises and pumped therefrom large quantities of water to supply its canal, whereby water that had already reached a surface stream was diverted by percolation from the plaintiff's dam, and the court decided that an action for damages would lie. In the case of *Van Wycklen v. City of Brooklyn*, 118 N. Y. 427, the second division of this court assumed, if it did not decide, that the same principle applied in the case of driven wells which sucked away the waters from a running stream after they had been collected therein. It is not necessary in this case to consider whether there are qualifications of this rule. ⁵²⁵ (See remarks of Pollock, C. B., in *Dickinson v. Canal Co.*, 7 Ex. 282, and opinion of Lord Wensleydale in *Chasemore v. Richards*, 7 H. L. Cas. 380.) The point here is whether the defendants, the contractors for building the conduit, are liable to the plaintiff.

It is conceded that the conduit was laid upon the lands of the city of Brooklyn under a contract with the city. The contract is not in evidence, but the court, on the trial, ruled, upon the request of the defendants, that the jury could not infer that the conduit was constructed contrary to the terms of the contract. The plaintiff acquiesced in this ruling, and the fact inferable from the evidence is, that the defendants, in constructing the conduit, and in the manner of executing the work, were complying with their contract with the city. We think the defendants are liable for any injury sustained by the plaintiff, resulting from the actual interruption of the flowing of the stream during the time they were engaged in constructing the conduit across it. It was a patent violation of the property rights of the lower proprietors, not justified by any necessity, so far as the record shows. The maxim. *aqua currit et debet currere*, says Denio, J., in *Bellinger v. New York Cent. R. R. Co.*, 23 N. Y. 42, "absolutely prohibits all

individuals from interfering with the natural flow of water to the prejudice of another riparian owner upon any pretense, and subjects him to damages at the suit of any party injured, without regard to any question of negligence or want of care." In constructing the conduit the defendants were not mere servants or laborers. They doubtless had a discretion, and could exercise an independent judgment in the method by which the conduit should be carried under the bed of the stream. They knew, or were bound to know, that they had no right to cut off the flow of water in the stream as against riparian owners below. A wrongdoer cannot interpose the direction of another to excuse a plain and palpable wrong. But the injury sustained during the temporary interruption of the flow of the stream, while the conduit was being laid across it, is comparatively of small ⁵²⁶ moment. The main question is, whether the contractors are liable for the injury caused by the conduit in draining the pond in the manner before stated. Upon this point we are of opinion that for this injury the owners of the land, by whose direction the conduit was constructed, are alone liable. There was evidence that the defendants commenced the work of building the conduit in September, 1890, and completed it the following November. The jury might have so found. This action was commenced in May, 1891. The trial judge, in substance, ruled that the defendants were liable for the injury caused by the draining of the pond up to the commencement of the action, on the theory that as the defendants constructed the conduit, and made the trench into which the water of the pond found its way by underground percolation, they were liable, and that it was immaterial whether the injury was suffered during the time they were engaged in performing the contract or after its completion. The rule upon which the case was submitted to the jury would render the defendants liable for recurring damages for all time, or until the cause of the damage was removed, or the city shall condemn the water rights of the plaintiff. We think such a principle has no foundation in the law. The construction of the conduit was, in itself, a perfectly lawful act. It became actionable as to the plaintiff for reasons which lay outside of the realm of observation, and from causes which the defendants had no reason to anticipate. The conditions happened to be such that the conduit did operate to drain the water of the plaintiff's pond, a mile away. It would be an unreasonable rule which

should subject a person doing an act on another's premises, under his authority, lawful in itself, to damages to the proprietor of adjacent lands, for consequential injuries, remotely resulting from the act, not naturally to be anticipated, and flowing from occult causes which, to put it in the strongest way, could only be conjectured by men of science, or disclosed by actual experiment. When the owner of land, in such case, ascertains that injury is being done, he may be bound to act. In the case of nuisance ⁵²⁷ it is said that "a party who has erected the nuisance will sometimes be answerable for its continuance after he has parted with the possession of the land. But it is only where he continues to derive a benefit from the nuisance, as by devising the premises or receiving rent" (Bronson, J., in *Mayor etc. v. Cunliff*, 2 N. Y. 174), or where he has conveyed with covenants for the continuance of the nuisance: *Waggoner v. Jermaine*, 3 Denio, 306; 45 Am. Dec. 474. The plaintiff's remedy is, we think, exclusively against the city, as the owner of the lands on which the conduit was laid, and the real author of the wrong for the consequential damages from the draining of the pond. The rule which would make the contractors liable would subject innocent parties, who cannot control, and have no power to interfere with the conduit, to liability for acts such as the owners of property may lawfully direct, and which involved injury to another, only because it turned out that the water of the pond communicated by hidden ways through the strata of the earth with the trench constructed by the defendants.

The judgment should be reversed, and a new trial ordered.

All concur.

Judgment reversed.

CONTRACTORS DOING PUBLIC WORK UNDER PUBLIC AUTHORITY are not liable for any injury, direct or consequential, to private property that may result therefrom, when they do the work in a proper and careful manner, under a contract with the government, which the government has authority to make: *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156; 30 Am. St. Rep. 649.

WATERS—ACTION FOR DRAINING.—Where a lake, formed by surface water, is situate on the lands of different owners, neither can drain it without the consent of the other: *Schaefer v. Marthaler*, 34 Minn. 487; 57 Am. Rep. 73. Any person who shall cause any change in a stream, so as to materially damage an owner of land on such stream, is liable for the damages occasioned thereby: *Tillotson v. Smith*, 32 N. H. 90; 64 Am. Dec. 355, and note; *Omelvany v. Jaggars*, 2 Hill, 634; 27 Am. Dec. 417, and note; *Martin v. Bigelow*, 2 Aikens, 184; 16 Am. Dec. 696; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587; 11 Am. St. Rep. 72, and note. See, also, the note to *Rowe v. St. Paul etc. Ry. Co.*, 16 Am. St. Rep. 710.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

O'TOOLE v. PITTSBURGH AND LAKE ERIE RAILROAD.

[158 PENNSYLVANIA STATE, 99.]

NEGLIGENCE AT RAILROAD CROSSINGS—LIABILITY FOR PERSONAL INJURY.

If a collision between the cars of a street-car company and those of a steam railroad company at a crossing is the result of the negligence of both companies each is answerable to a passenger of the street-car company injured thereby; but if the collision is the result wholly of the negligence of the street-car company, the railroad company is not answerable.

NEGLIGENCE—RAILROAD COLLISIONS—DUTY OF PASSENGER AT CROSSING.

A passenger on a street-car has the right to presume that he will be carried safely, and when approaching a railroad crossing is under no obligation to look and listen for an approaching train or to jump from the car in apprehension of possible collisions.

Oscar L. Jackson, for the appellant.

D. B. Kurtz and L. T. Kurtz, for the appellee.

¹⁰³ DEAN, J. The defendant operates a steam railroad running through the borough of Newcastle. Its road crosses at grade South Mill street diagonally. The New Castle Electric Street Railway has its rails longitudinally on the same street; hence the two tracks cross each other at grade on this street. There are guard-gates at the crossing, under the control of the defendant, to be raised or lowered on the approach of a locomotive to the crossing. On the 14th of March, 1891, the plaintiff, a shoemaker by trade, a cripple from birth in both feet, took a seat in the ¹⁰⁴ street-car to go north through the town. When the car came to a point about seventy-five feet from the crossing a locomotive approached going southwest, the watchman lowered the gates, the street-car stopped, the loco-

motive crossed, the watchman raised the gates, the car started, and as it reached the railroad track was struck by another locomotive following the one that had passed. There is some conflict in the testimony as to whether the gate was wholly or partly closed at the moment of collision. A house obstructs the view of the track in the direction from which the locomotive came, except when quite near the point of crossing.

The plaintiff, in the collision, was thrown out and seriously injured. Under the instructions of the court, the verdict was for defendant. There was some evidence, on part of defendant, that the collision was wholly the result of the negligence of the street-car company; that those in charge of the car disregarded the warning of the watchman and the lowering of the gate for the second locomotive to pass. But that the collision was the result of the negligence of one or other company, or of the concurring negligence of both, could not have been doubted on the evidence.

The learned judge of the court below, on the evidence, properly instructed the jury: 1. That if the collision was the result of negligence of both parties, each was answerable to plaintiff, and he could maintain his suit against either; 2. If the collision was the result wholly of the negligence of the street-car company, the defendant was not answerable. But the plaintiff, in his several assignments of error, complains of the instructions with reference to his duty as a passenger under the circumstances here developed. The fifth and sixth assignments in substance embrace this alleged error. The court instructed the jury: "If Michael O'Toole upon that street-car could have seen the engine, and did not undertake to see it, or did not exercise reasonable care for the purpose of ascertaining whether they could proceed across the railway track in safety, then he would be guilty of contributory negligence. . . . And if, by looking up the railroad at that time, he could have learned whether an engine was or was not approaching, and could at that time have gotten off the car if he discovered an engine approaching, and did not do that, then he would be guilty of contributory negligence and could not recover."

¹⁰⁵ Then further on is this instruction: "But the fact that safety gates are erected does not in any way affect the responsibility or the liability of the railroad company in the operation of its railroad, or in the management of its trains. . . . But if you conclude that the gates were not lowered,

that fact of itself is not sufficient to warrant you in finding a verdict for the plaintiff. Had the plaintiff been walking along the street, the fact that the gates were not lowered would not be an invitation to him to cross the railroad in violation of the rule of law that he shall stop, look, and listen when approaching a railroad crossing. And that rule is not taken away because the plaintiff happened to be in a street-car at the time."

Defendant's counsel argues that these are mere excerpts from the charge, and, standing alone, do not present fairly the instruction really given to the jury; that this can only be properly understood when read in connection with what preceded and followed. Certainly, the charge must be taken as a whole, to arrive at the correct meaning. We have carefully read it in the light of the evidence, and are forced to the conclusion the tendency was to mislead the jury. We find no evidence which warranted such instruction.

Negligence is the absence of care according to the circumstances. There was evidence here from which the jury might have found there was no negligence on part of defendant, and that the street-car company was negligent; they might have found the defendant was negligent, and the street-car company was not; they might have found both were negligent. But a careful search for any evidence of negligence, under the circumstances, on the part of plaintiff, has been fruitless.

He was a passenger of the street-car company, which had contracted to carry him safely; he had a right to presume they would exercise the care required in this undertaking. When the car approached the crossing it stopped; he was in no danger then, and had no reason to apprehend any; when it started he had a right to believe it did so because the crossing was clear; running a distance of about seventy-five feet, the collision occurred; in the very few seconds which were necessary to accomplish this distance, the court, in substance, instructs the jury that it was plaintiff's duty to be on the lookout to learn if the railroad track could be safely crossed; and if, by so doing, ¹⁰⁶ he could have seen the approaching locomotive, ordinary care required him to jump off. To impose such a duty on a passenger, under these circumstances, is going much further than any court has yet gone. All experience has demonstrated that to get off a moving car is highly dangerous; therefore, it is held that such an act is negligence *per se*, and

the passenger if thereby injured, except in very rare cases, is guilty of contributory negligence, and cannot recover. Hence here, if the plaintiff had been on the lookout, and had seen the approaching locomotive, ordinary care did not require he should make a dangerous jump to escape a problematical collision. Admit he had some reason to apprehend danger if he remained in the car, at the worst, this was only to him a possible danger. A careful man, ignorant of the power of control of the engineer over the locomotive, or of the motorman over the electric-car, and knowing nothing of the rules governing them in approaching the crossing, might very well think one or the other would stop before reaching it. He had no right or power to control or direct those in charge of either; he was warranted in assuming that they knew their business better than a shoemaker, and would by proper care avert the possible collision. Therefore, holding him rigidly to the rule of ordinary care, at best he had a choice of perils—a choice to be exercised on the instant, by a man crippled in both feet, and consequently a not very agile jumper. He had been put in this position by no act of his own, but by the negligence of one or other, or both, of the railroad companies.

We fail to see any evidence of absence of ordinary care here, under these circumstances. The instruction, in substance, that ordinary care required plaintiff to perform the duties of conductor and motorman—that, practically, he was to exercise the same care as if he had been driving his own horse, “stop, look, and listen”—was erroneous, and calculated to mislead the jury. It would have been but a step further, and a short step at that, to have directed the jury to inquire whether plaintiff had not been guilty of contributory negligence in taking passage on a street-car which he knew in its route would cross a steam railroad at grade. The law imposes no such duty upon the traveler by public conveyance as laid down in this charge.

The cases of *Crescent Township v. Anderson*, 114 Pa. St. 643, 60 Am. Rep. 367, ¹⁰⁷ and *Dean v. Pennsylvania R. R. Co.*, 129 Pa. St. 514, 15 Am. St. Rep. 733, cited and relied on by appellee as sustaining the instruction complained of, really recognize the opposite doctrine. Both are cases where the plaintiffs, when injured, were riding in private vehicles driven by another, and both were injured by the contributory negligence of the driver, and a third party, the defendant. In both the decision was put on the ground that the negligence of the

driver of the horse was apparent, and he was to some extent under the direction or control of the party injured. There was no attempt, by remonstrance or otherwise, by the party injured, to restrain the negligent driver. The negligence of the driver was not, in either case, imputed to an innocent plaintiff, but the latter was held to have participated in the negligence which caused the accident. *Carlisle v. Brisbane*, 113 Pa. St. 544, 57 Am. Rep. 483, is to the same effect, and the decision is expressly put on the ground that, although the conveyance was a private one, the injured party did not, to any degree, participate in the alleged negligence of the driver. The plaintiff here was a passenger in a public conveyance; he conformed to the rules of the company; kept his seat, relying on the vigilance and care of those in charge of the car, as his contract gave him the right to do. There was upon him no duty of moving the car with caution at dangerous crossings; no duty of watching for possible collisions, and jumping off in apprehension of them.

Consequently the learned court below erred in its instructions embraced in plaintiff's fifth and sixth assignments of error.

The judgment is reversed, and venire facias *de novo* awarded.

NEGLIGENCE—LIABILITY FOR CONCURRING NEGLIGENCE.—When a person is injured by the concurrent negligence of two persons, one of them being at the time the common carrier of his person, both tortfeasors are jointly and severally liable to him in damages: *Bunting v. Hogsett*, 139 Pa. St. 363, 23 Am. St. Rep. 192, and note; *Flaherty v. Minneapolis etc. Ry. Co.*, 39 Minn. 328; 12 Am. St. Rep. 654, and note; note to *Cartersville v. Cook*, 16 Am. St. Rep. 251; extended notes to *New York etc. R. R. Co. v. Steinbrenner*, 54 Am. Rep. 135, and *Borough of Carlisle v. Brisbane*, 57 Am. Rep. 483.

STREET RAILWAYS—DEGREE OF CARE REQUIRED OF.—Street railways, in the carriage of passengers, are bound to exercise extraordinary care, and the utmost skill, diligence, and human foresight, and are liable for the slightest negligence: *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, *ante*, p. 753, and note; *Topeka Ry. Co. v. Higgs*, 38 Kan. 375; 5 Am. St. Rep. 754.

**FLEMING v. PITTSBURGH, CINCINNATI, CHICAGO, AND
ST. LOUIS RAILWAY.**

[158 PENNSYLVANIA STATE, 130.]

NEGLIGENCE—PRESUMPTION OF.—Injury to a passenger in consequence of something done or not done by the carrier or his employees, or connected with the appliances of transportation, raises a presumption of negligence which the carrier is required to rebut.

NEGLIGENCE—PRESUMPTION OF.—An injury to a railroad passenger which has no connection with the machinery or appliances of transportation, and so disconnected from the operation of the business of the carrier as not to involve the safety or sufficiency of the instrumentalities of transportation, or the negligence of his servants, raises no presumption of negligence against the carrier, and the burden of proof to show such negligence is upon the party who avers it.

TRESPASS to recover for the death of plaintiff's daughter, aged fifteen years, who was killed while traveling as a passenger on defendant's railroad. Judgment for plaintiff, and defendant appealed.

A. M. Todd and E. Y. Breck, for the appellant.

M. L. A. McCracken, for the appellee.

135 THOMPSON, J. The first two assignments of error are based upon the refusal of the learned trial judge to charge as follows:

"1. The burden of proof is on the plaintiff to show that the death of her daughter was caused by the defendant, and under the circumstances of the present case the burden resting on the plaintiff is not satisfied by the mere presumption of negligence which sometimes arises against the carrying company when a passenger is killed or injured; 2. Under the circumstances of the present case the burden of proof is not shifted from the plaintiff by the mere fact that her daughter was killed while a passenger on defendant's railroad, but the plaintiff must show such facts as will connect the defendant or its servants, or some of the appliances of transportation, with the happening of the injury."

Authority need scarcely be cited to establish that where an injury occurs to a passenger in consequence of something done or not done, connected with the appliances of transportation, there arises the presumption of negligence, which the carrier is required to rebut. This presumption necessarily arises from the contract of carriage, under which the passenger passively trusts himself to the safety of the carrier's means of transportation, and to the skill, diligence, and care of his

servants; and by which the carrier, in consideration of the fare, undertakes to carry safely, and, to do so, to furnish the best means and appliances for the purpose, and competent, skillful, and diligent servants. An accident connected with them raises the presumption that they were not such, and that the carrier was guilty of negligence. But if the accident has no connection with the appliances or machinery, if it is so disconnected with the operation of the business of the carrier as not to involve the safety or sufficiency of the instrumentalities, or the negligence of his servants, no such presumption arises, and the burden of proof to show negligence is upon the plaintiff who avers it.

¹³⁶ In *Thomas v. Philadelphia etc. R. R. Co.*, 148 Pa. St. 183, where the accident occurred to a passenger seated at an open window, who was struck by a missile, causing the injury, and where there was no evidence as to how the missile came to be thrown, Mr. Chief Justice Paxson said: "The rule appears to be that where a passenger is injured either by any thing done or omitted by the carrier or its employees, or any thing connected with the appliances of transportation, the burden of proof is upon the carrier to show that such injury was in no way the result of its negligence. But to throw this burden upon the carrier, it must first be shown that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation."

In the present case it is not shown that the accident was in consequence of a defect in any of the appliances or machinery used, or of the negligence of appellant's employees in their conduct of the train. It was the result of a rock becoming detached and falling upon the train while passing a point where the hill descends precipitously to the track. From it, at the place of the accident, to the top of the hill is a distance of 456 feet. The cut for the railroad extends upward 33 feet, and above it is the natural hill. The rock which fell started at about 100 feet from the top of the hill, bounded down some 40 feet, struck, again bounded 20 or 30 feet, making four bounds before it struck the train, and caused the death of appellee's daughter. It is clear that the fall of the rock was in no way connected with the appliances or machinery used in the operation of the road, or the acts of the employees in the conduct of the train or in the construction of the road,

and therefore there is no presumption of negligence on the part of appellants.

But appellee contends that the presumption of negligence arises in this case, and in support of his contention cites the following cases: *Sullivan v. Philadelphia etc. R. R. Co.*, 30 Pa. St. 234; 72 Am. Dec. 698. In this case the accident was caused by a cow upon defendant's track, and the opinion indicates that in the conduct of its business it was the duty of the company to fence the track or enforce the owner's obligation to keep his cattle at home: *Spear* ¹³⁷ *v. Philadelphia etc. R. R. Co.*, 119 Pa. St. 68. In this case Mr. Justice Williams says: "The person injured was a passenger; the injury occurred after the carriage had begun, and the cause of the injury was an explosion on the boat which was the vehicle or instrument of carriage, and which was under the exclusive care and control of defendant's servants": *Gleeson v. Virginia Midland R. R. Co.*, 140 U. S. 435. In this case the accident was caused by a land slide in a cut some 15 or 20 feet deep. In the opinion of the court it is said: "The railroad cut is as much a part of the railroad structure as is the fill. They are both necessary, and both are intended for one result, which is the production of a level track over which the trains may be propelled. The cut is made by the company no less than the fill; and the banks are not the result of natural causes, but of the direct intervention of the company's work. If it be the duty of the company (as it unquestionably is), in the erection of the fills and the necessary bridges, to so construct them that they shall be reasonably safe, and to maintain them in a reasonably safe condition, no reason can be assigned why the same duty should not exist in regard to the cuts. Thus the cause of the accident was connected with the construction of the road.

The difference between the cases cited and the present one is clear. In them the cause of the accident was connected with the means and appliances of transportation and the construction of the road, and in this it was disconnected with them. As the first two assignments of error are sustained, it is not necessary to discuss the others.

The judgment is reversed, and a venire *facias de novo* awarded.

NEGLECT OF CARRIER—PRESUMPTION FROM HAPPENING OF ACCIDENT. If a passenger receives injury from the derailment of a railway car, the presumption is that such derailment resulted from the negligence of the car-

rier: *Alabama etc. R. R. Co. v. Hill*, 93 Ala. 514; 30 Am. St. Rep. 65, and note. An injurious accident alone raises a *prima facie* presumption of negligence on the part of the carrier, and devolves upon him the duty to disprove such negligence: *Buck v. Pennsylvania R. R. Co.*, 150 Pa. St. 170; 30 Am. St. Rep. 800; *Thyng v. Fitchburg R. R. Co.*, 156 Mass. 13; 32 Am. St. Rep. 425. See, further, the extended notes to *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490, and *Huey v. Gahlenbeck*, 6 Am. St. Rep. 794. But in *Hawkins v. Front Street etc. Ry. Co.*, 3 Wash. 592, 28 Am. St. Rep. 72, it was held that the fact that a passenger on a cable-car in a city was injured without fault of his own does not raise a presumption of negligence, casting the burden on the railway company to disprove it. Mere proof of injury does not raise a presumption of negligence against a carrier sufficient to impose on him the burden to prove due care. The plaintiff must show an accident from which the injury resulted, or circumstances of such character as impute negligence: *Birmingham etc. Ry. Co. v. Hale*, 90 Ala. 8; 24 Am. St. Rep. 748, and note; nor will negligence be presumed against a carrier from the mere happening of an accident when the accident is due to an independent cause, and not to the failure of any of the appliances of transportation: *Long v. Pennsylvania R. R. Co.*, 147 Pa. St. 343; 30 Am. St. Rep. 782, and extended note; *Pennsylvania R. R. Co. v. MacKinney*, 124 Pa. St. 482; 10 Am. St. Rep. 601, and note.

DUNHAM v. LOVEROCK.

[158 PENNSYLVANIA STATE, 197.]

PARTNERSHIP IS CREATED only by contract, express or implied, and the burden of showing its existence is on him who alleges it.

COTENANCY—PARTNERSHIP.—An agreement between cotenants of an oil lease to drill an oil well on the leased premises, at the common cost of the cotenants, does not, as between them, create a partnership agreement.

COTENANTS MAY BECOME PARTNERS if they agree to assume that relation towards each other; but the law does not create that relation for them as the consequence of a course of conduct and dealing naturally referable to a relation already existing between them, making such a course of conduct to their common advantage.

Roger Sherman and Samuel Grumbine, for the appellant.

George S. Criswell and J. W. Lee, for the appellee.

201 **WILLIAMS, J.** The important facts in this case are few and free from controversy. The question presented is new, and has considerable practical importance. For some time prior to the 16th of January, 1889, William Loverock was the owner of an undivided one-half part of a leasehold estate in about ten acres of land, and of the oil well, fixtures, and machinery on said leasehold. At the date above mentioned M. B. Dunham purchased the other undivided one-half part of the same leasehold, and of the well, and other property thereon, from a former owner. At the time of his purchase

the well was being operated for oil, and the oil produced was run into the pipe lines and credited to the several parties interested as follows: The royalty to Coutant, the lessor; one-half of the residue to Loverock, and the other half to Black, who was Dunham's vendor. It is not denied that the relation existing between Dunham, at the time of his purchase, and Loverock was that of tenants in common. There was no unity of title between them, but there was unity of possession. The leasehold was being operated for the common benefit of its owners; and the production divided equally between them in the hands of the pipe line company that transported and stored the oil. Each took his own share of the oil, and paid his share of the current expenses of production. Dunham subsequently conveyed one-half of his title to his son, who thus became a tenant in common with the other owners by virtue of the conveyance, and without regard to the wish or consent of Loverock. Some time after the Dunhams had acquired their interest in the leasehold, Loverock called on them to suggest that another well should be drilled on the land. He offered to put up a derrick for that purpose, and pay his proportion of the cost of the well, if the Dunhams would take charge of and conduct the work on the ground. This was agreed to. He built the derrick. The Dunhams drilled the well, which proved to be productive. The oil therefrom was run into the same tank, taken into the same line, and there divided in the same manner as the oil from the first well. The ²⁰² plaintiff now claims a balance to be due him from Loverock for his share of the cost of the well. Pickett having meantime purchased Loverock's half of the property, the plaintiff alleges that the cotenants were partners, and that Pickett took subject to a settlement of the accounts between his vendor and the firm. No contract of partnership, written or oral, is shown, but it is contended that a partnership resulted from the agreement to drill another well on the leasehold at the common cost of the owners. It must be remembered that this question is not raised between third persons and the tenants in common, but *inter sese*. What other persons may have thought, or in what manner they may have charged goods furnished for the work on the well, is not now the question; but what was the actual fact as between themselves? When the new well was proposed they were simply tenants in common of the ten acres covered by the lease, and of the well and machinery thereon. As such

they contributed to the cost of operating the well, and divided the product. The new well was on the same lease. It was to the interest of each of the cotenants that it should be put down, and it was an undertaking which was appropriate to tenants in common, since it would increase the product of the common property. In the absence of a distinct agreement between them that their relations to the property and to each other should be changed, the presumption is that the old relation continued, and that they treated with each other as owners of separate interests in an undivided lease.

It is elementary law that a partnership is created only by a contract, express or implied. The burden of showing its existence is on him who alleges it, and this burden the court below rightly held had not been lifted by the plaintiff. To be sure there was undivided possession of the lease, but unity of possession is one of the distinguishing characteristics of a tenancy in common. There was contribution to the cost of operating the well, or wells, but this could be compelled between tenants in common by bill or by account render. There was division of the product, but this was in accordance with the rights of the cotenants. Each had a right to share in the product in proportion to his interest in the estate. It may be said that there was a resulting division of profits, since, if the product exceeded the cost of production, there was a profit to each part owner; but ²⁰² if so it was shown by the settlement of his individual accounts only, and grew out of the fact that he received from his share of the product more than it cost him to secure it.

So it may be said there was a contribution to losses, since each tenant sustained a loss when the value of his share of the product fell below its cost to him, but this was the individual loss of each, with which no one else had any concern, and to which no one was bound to contribute. There is, therefore, no circumstance relating to the business done upon, or the development of, the lease not fairly and naturally referable to the relations of the parties sustained to each other as tenants in common. There is no agreement shown that tenants in common might not properly make with each other for the development of the property in which each held a separate title, but an undivided possession. Between persons so situated a partnership does not result by implication of law. It must be created by an agreement. As we fully agree with the court below that no such agreement is shown, it is not

necessary to consider the authorities cited by the learned master, and by counsel to their printed briefs, showing what are the ordinary *indicia* of a partnership. There can be no controversy over such questions in this case, for the plaintiff fails for want of proofs sufficient to furnish a foothold for him on the facts. Tenants in common may become partners, like other persons, where they agree to assume that relation towards each other; but the law will not create the relation for them as the consequence of a course of conduct and dealing naturally referable to a relation already existing between them, which made such a course of conduct to their common advantage. The plaintiff and defendants, upon the facts before us, were tenants in common.

The decree appealed from gave to the plaintiff all the relief to which he is entitled in this case, and it is now affirmed.

PARTNERSHIP—HOW CREATED.—To constitute a partnership there must be some joint adventure and an agreement to share in the profits of the undertaking: *Loomis v. Marshall*, 12 Conn. 69; 30 Am. Dec. 598, and note; *Price v. Alexander*, 2 G. Greene, 427; 52 Am. Dec. 526, and note. A partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some of them, in a lawful business, and to divide the profits and bear the losses in certain proportions: *Goldsmith v. Eichold*, 94 Ala. 116; 33 Am. St. Rep. 97, and note; *Howell v. Harvey*, 5 Ark. 270; 39 Am. Dec. 376, and note; *Gibbs' Estate*, 157 Pa. St. 59.

PARTNERSHIP—BURDEN OF PROOF.—The burden of proving the existence of a partnership devolves upon the party alleging it: *Furber v. Page*, 143 Ill. 622; extended note to *Hahlo v. Mayer*, 22 Am. St. Rep. 762.

SUTTON v. MORGAN.

[158 PENNSYLVANIA STATE, 204.]

VENDOR AND VENDEE—RESCISSION.—A CONTRACT FOR THE SALE OF LAND may be rescinded by the vendee, when his agreement to purchase the land at twice its value has been induced by false representations of the vendor's agent that there is great demand for building lots on the land, that a railroad company is about to erect shops in the vicinity, that a syndicate had been formed to secure the land, and had offered a large sum of money for it, but he is guilty of such gross carelessness in acting upon such representations without making inquiry as to their truth, that he is not entitled to recover his costs in his suit in equity to rescind the contract.

A. B. Hay, A. Blakeley, and A. M. and W. A. Blakeley, for the appellants.

John P. Blair, A. H. Clark, and E. B. Dougherty, for the appellee.

216 WILLIAMS, J. The plaintiff sought and obtained in the court below the rescission of a contract made by him with Mrs. Morgan for the purchase of her farm near Remington station on the Pittsburgh, Fort Wayne, and Chicago Railroad. The ground on which his right to relief was placed was that the execution of the contract by him had been induced by fraudulent misrepresentations, made to him by Mrs. Morgan's agents, particularly by her husband and John E. Glass, largely through J. C. Williams, who was a co-purchaser of the land, and whose interest therein was now held by the plaintiff. The master found that the negotiations were conducted between Williams and Morgan; and that the representations made by Morgan and Glass to him were repeated by Williams to Sutton, and induced the purchase by him. He finds that several of these representations were in fact false. Among them are the following: The thirty-four acres lying between the railroad and the river, amounting to nearly one-third of the farm, were represented as suitable for building lots, and above the reach of ordinary floods. The master finds that most of this land could be made suitable for building only by filling. It was represented that extensive railroad yards were being opened in the immediate neighborhood of this farm, and that there was at the time these **217** negotiations were going on an active demand for lots on this farm. The master finds that no such demand existed. It was represented that the car-shops of the railroad company were to be moved to the neighborhood of this farm, and that men connected with the road had declared that it was their purpose to make another city there, like Altoona. This was not true. It was represented that a syndicate of men connected with the railroad company had been formed, and that an offer of \$75,000 had been made for the farm on their behalf, payable \$65,000 in cash and mortgage, and \$10,000 in the stock of the land company to be formed by the purchasers.

The master found that no syndicate had been formed or offer made. Under the influence of these representations the plaintiff was led to buy the farm at \$65,000. The master finds that it was at the time worth not more than \$30,000, "unless for speculative purposes"; but he does not find what its speculative value was, nor is it easy to see how the speculative value could have been much in advance of its actual value for business purposes, since no operations were in progress or

in contemplation calculated to enhance its value in the near future. But the master found further that Morgan believed the representations he made to be substantially true, and that there was no fraudulent combination between Morgan and Glass, or Morgan and Williams, to defraud Sutton, and for this reason recommended a decree dismissing the bill.

The learned judge who sat as chancellor in this case differed from the master in relation to the character of the representations made by Morgan. He found the fact to be that Morgan had no reasonable ground for belief that the shops of the railroad company were about to be removed, or that a syndicate of men connected with the company had been formed for the purchase of his wife's farm, or that he had been offered by such men, or any one on their behalf, the sum of \$75,000, or any other sum, for it. He further found that the representations made by Glass to Williams in regard to the same subjects, viz., the removal of the shops, the existence of the syndicate, and the offer on its behalf of \$75,000 for the farm, were false; that Glass knew them to be untrue when he made them; and that they were made to aid Morgan in effecting a sale by stimulating Williams, and through him those whom he represented, to conclude a contract at once before the syndicate would be ready to make the advance payment and take the property. He thus reversed the master's finding as to the good faith of the representations made by both Morgan and Glass, and reached the conclusion that the contract of sale was procured by representations that were untrue, and known to be untrue by those who made them. Upon the findings of fact so modified he declined the decree recommended by the master, and held the plaintiff entitled to the relief prayed for.

This appeal from the decree so made requires us to examine the evidence so as to determine whether the conclusions of the master, or of the court below, should be adopted. This examination we have made, and we are led by it to concur with the learned judge in his findings and conclusions. The master found that Sutton agreed to pay more than twice the actual value of the farm; that he did this under the belief that the representations made to Williams, and communicated by him, were true, and that these representations were not true. The learned judge concurs in these findings, and so far there is no room for doubt. The evidence, however, sustains the judge in the further finding that both Morgan and

Glass knew their statements in regard to the removal of the shops, the existence of the syndicate of men connected with the railroad, and the offer of \$75,000 by that syndicate for the farm, were not true; and that these statements were made to raise delusive expectations of gain, and to hasten the making of a purchase by Williams and the person whom he represented. It is said that Williams should have inquired for himself, and that his opportunities of obtaining information were just as good as those of Morgan. This may be. Prudence should have led him and his "financial man" Sutton to test the truth of the glowing statements made by Morgan and Glass; but it did not. They fell easily into the trap, which was set with some skill and some effrontery, for them; but their neglect or want of prudence cannot justify the falsehood or fraud of those who practiced upon their credulity. The doctrine of contributory negligence cannot be invoked by the defendants to save them from liability for misleading ³¹⁹ their victim. They must stand or fall on the truth and good faith of the representations that led to the sale. Was there an active demand for lots on the Morgan farm when Williams was told there was? The master and the learned court both find there was none. Was the railroad company about to remove its shops to that point, and build another Altoona there? It is settled that it was not. Did a syndicate of prominent capitalists and railroad men exist that had been formed to secure this farm? No such syndicate existed. Had Morgan been offered by this syndicate, or by any one on its behalf, \$75,000 for the farm? He had not. Let us suppose the fact to be, as the master supposes, that Morgan was misled by rumors of an intended removal of the shops, and entertained an expectation that it might be done, how could he be deceived about a demand on him for lots, or an offer made to him by the alleged syndicate? These statements were false. He knew they were false. He made them to deceive Williams and secure a purchaser. He accomplished his purpose. He inflamed the expectations and quickened the action of his dupe; but it is against equity that an advantage so obtained shall be enjoyed, and the person who has been wronged left without a remedy.

We think the learned judge was right in his view of this case, and his decree, so far as it relates to the rescission of the contract, the return of the money paid, and the cancellation of the mortgage, is affirmed. For his gross carelessness

the plaintiff ought to lose his costs. No bill of costs will be taxed for the plaintiff.

VENDOR AND PURCHASER—RESCISSION BY VENDEE FOR MISREPRESENTATIONS OF VENDOR.—A court of equity will rescind a contract for the sale of land at the instance of the purchaser on account of the vendor's false representations of material facts not open to inspection upon which the purchaser had a right to rely, did rely, and was thereby injured: *New Orleans etc. Mtn. Co. v. Musgrove*, 90 Ala. 428; *Porter v. Collins*, 90 Ala. 510; *Hill v. Wilson*, 88 Cal. 92; *Waincott v. Occidental Loan Assn.*, 98 Cal. 253; *Cressler v. Rees*, 27 Neb. 515; 20 Am. St. Rep. 691, and note; *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178, and note. See the extended notes to *Collins v. Krum*, 18 Am. St. Rep. 556, and *Richardson v. McKinson*, 12 Am. Dec. 312. Where one purchases land, and has an opportunity to examine it, the contract of sale will not be set aside unless the vendor practiced some fraud to prevent such examination: *Thompson v. Boyce*, 84 Ga. 497; but see *Bullock v. Tuttle*, 90 Ala. 435.

HEILBRON v. HEILBRON.

[158 PENNSYLVANIA STATE, 297.]

MARRIAGE AND DIVORCE—CRUELTY—EVIDENCE TO SUSTAIN.—A complaint in an action for divorce by a husband against his wife for cruel and barbarous treatment is sustained by her admissions on cross-examination that she broke the glass door of her husband's store, interfered with his customers, broke dishes and threw them downstairs, threw hot water on the hired girl, and on two occasions, when her stepsons complained of dinner, brought in slop and threw it on the table.

MARRIAGE AND DIVORCE—SUFFICIENCY OF COMPLAINT IN DIVORCE—SURPLUSAGE.—If a complaint in an action for divorce stating a good cause of action sustained by the evidence, also contains additional matter which makes it inconsistent in its terms, and therefore demurrable, it should be amended by striking out such inconsistent matter as surplusage, and thereupon a divorce should be decreed.

MARRIAGE AND DIVORCE—ALIMONY.—Under a petition for alimony *pendente lite*, the court, in dismissing the action, cannot require alimony to be paid until the further order of the court. The order must be limited to the pendency of the suit.

MARRIAGE AND DIVORCE—ALIMONY—PENDENTE LITE.—An order of the court of quarter sessions in an action for divorce requiring the libellant to pay for the support of his wife, does not prevent the court of common pleas from decreeing alimony *pendente lite*. Both orders may run concurrently during the pendency of the proceedings, but when the common pleas has awarded a divorce, with or without alimony, the jurisdiction of the quarter sessions ends.

Frank and William Whitesell, for the appellant.

J. G. Silvius, for the appellee.

300 MITCHELL, J. The libel sets out a statutory cause of divorce in general terms, that the respondent had by her conduct rendered the condition of the libelant intolerable, and his life burdensome, but then unfortunately proceeds to specify particulars which tend to negative the general averment.

"Thereby," it charges, he was obliged to expend money for a trip to Europe for her, he was left alone and forced to break up housekeeping, and the fact that she remained away became the scandal and talk of the neighborhood. Her going away was by his consent, even if extorted reluctantly, and if she remained away against his will and request, that tended to prove desertion, not cruel and barbarous treatment. The libel, therefore, was defective, and if that were all that was in the case, it was rightly dismissed.

But an examination of the evidence forces us to differ entirely from the view taken by the learned court below. Many outbursts of temper on the part of respondent, not confined to bad language and threats, but accompanied by acts of great violence, are testified to by several witnesses, and are scarcely denied by the respondent herself. Thus, she admits, on cross-examination, that she broke the glass door in his store, and interfered with his customers, that she broke dishes and threw them downstairs, threw hot coffee on the girl, and on two occasions when her stepsons complained of the dinner, she brought in slop and threw it on the table. The testimony of the other witnesses enlarges this list considerably by matters not necessary to detail. Her own admissions give them more force than possibly they might have of themselves. The weight of the evidence shows a course of conduct well calculated to make any man's life burdensome. The libelant's conduct was not nice or liberal, but we see no ground for saying that the respondent was the injured party. On the contrary, a case for divorce on the general ground of conduct rendering libelant's condition intolerable, and his life burdensome, is made out.

301 The libel as already said was formally defective, but the defect was in setting out too much, not too little. A good cause of action is averred in the terms of the statute, and the evidence sustains it. The particulars which make the libel inconsistent, and therefore demurrable, may be struck out as surplusage without in any way changing the cause of action, or the relevancy of the evidence to it. We are of opinion that an amendment in that respect should be allowed, and thereupon a divorce decreed.

The decree made was also erroneous in another respect which must have been an oversight of the learned court below. It ordered alimony to be paid at the rate of six dollars a week "until the further order of the court." For this there was no warrant. The respondent's petition was for alimony *pendente lite*, and the order of the court should have been limited to the pendency of the suit. With the decree dismissing the libel the order for alimony should have terminated.

The existence of an order of the quarter sessions requiring libellant to pay six dollars a week for the support of his wife did not prevent the court of common pleas from decreeing alimony *pendente lite*. On the contrary, the superior, or, rather the more general, jurisdiction on this subject is in the divorce court. It may decree such sum as the circumstances call for, to be commensurate with the position and financial ability of the parties. The quarter sessions, on the other hand, is limited to the prevention of the wife becoming a charge on the public. Both orders may run concurrently during the pendency of the proceedings, but when the common pleas has awarded a divorce, with or without alimony, the jurisdiction of the quarter sessions will be at an end.

Decree reversed and *procedendo* awarded.

MARRIAGE AND DIVORCE—CRUELTY OF WIFE—WHAT IS.—Outbreaks of passion and violence on the part of a wife when under the influence of liquor do not constitute such cruel treatment as to entitle the husband to a divorce *a mensa et thoro*: *Shutt v. Shutt*, 71 Md. 193; 17 Am. St. Rep. 519, but where a wife refuses to cohabit with her husband, finally driving him away from the home which he had given her and leasing the same to strangers, this constitutes such cruelty on her part as to entitle him to a divorce: *Menzer v. Menzer*, 83 Mich. 319; 21 Am. St. Rep. 605, and note. See the extended notes to *Poor v. Poor*, 29 Am. Dec. 674, and *Morris v. Morris*, 73 Am. Dec. 619.

ALIMONY PENDENTE LITE.—WHEN GRANTED: See the extended note to *Methvin v. Methvin*, 60 Am. Dec. 673, and *Lea v. Lea*, 104 N. C. 603; 17 Am. St. Rep. 692, and note. An order for alimony *pendente lite* ceases to have any operation after the entry of judgment: *Langan v. Langan*, 91 Cal. 654, but the allowance continues during the pendency of the appeal and until the final determination of the action: *McBride v. McBride*, 119 N. Y. 519.

DERR v. LEHIGH VALLEY RAILROAD COMPANY.

[156 PENNSYLVANIA STATE, 365.]

CONFLICT OF LAW—RECOVERY FOR INJURY RECEIVED IN ONE STATE RESULTING IN DEATH IN ANOTHER.—If a person injured in one state dies of such injury in another state, his personal representative cannot maintain an action to recover therefor in the latter state unless a negligent act or omission suffered there is directly responsible for, and the proximate cause of, the injury sustained in the former state.

W. C. Shipman and A. B. Howell, for the appellant.

Edward J. Fox and William Fackenthall, for the appellee.

369 McCOLLUM, J. Conrad Derr, a locomotive engineer, died on the 15th of March, 1888, from an injury he received the preceding day while in the service of the Lehigh Valley Railroad Company. His widow and children, alleging that his death was due to the negligence of the defendant company, brought this action to recover compensation for their loss. It was shown, on the trial, that the injury was received in a cut on the Easton and Amboy division between Three Bridges and Neshanic in New Jersey, and that the death as a result of the injury occurred in Northampton 370 county, Pennsylvania. It appears to have been conceded that in order to recover in this suit it was necessary to show an act of negligence in Pennsylvania, which was the proximate cause of the injury received in New Jersey. The learned judge of the court below, being unable to discover such negligence in the testimony submitted in support of the action, entered a compulsory nonsuit; and from his denial of the motion to set it aside, this appeal was taken.

A considerable portion of the argument contained in the appellant's paper book is devoted to a discussion of the question of jurisdiction. It assumes that the deceased was sent out upon the road on the 14th of March without sufficient information concerning the obstructions in his path and the work he was to do, and that the failure of the company to give him such information before he left Easton was the proximate cause of the injury which resulted in his death. It will thus be seen that the negligence complained of was an omission of duty in Pennsylvania which, it is claimed, was the sole cause of the accident in New Jersey. The principle settled in *Usher v. West Jersey Co.*, 126 Pa. St. 206, 12 Am. St. Rep. 863, is not disputed. In that case the negligence, the injury, and the death were in New Jersey, and the right

of action for the benefit of the widow and next of kin was given by the New Jersey statute to the personal representatives of the deceased. A suit to enforce this right was brought in Pennsylvania by the widow for the benefit of herself and child, and it was held that, as the right was statutory, it must be asserted in the name of the persons to whom it was given. But *Usher v. Railroad Co.*, 126 Pa. St. 206, 12 Am. St. Rep. 863, is not decisive of the question raised in this case, if the appellant's contention in respect to the negligence and the proximate cause of the injury is well founded. It must be remembered, however, that unless a negligent act or omission in Pennsylvania, which was directly responsible for the injury received in New Jersey, is shown by the evidence, there is no question of jurisdiction to be considered. If the evidence is insufficient to warrant an inference of such negligence, the nonsuit, on the authority of *Usher v. West Jersey Co.*, 126 Pa. St. 206, 12 Am. St. Rep. 863, must be sustained.

We turn then to the testimony submitted by the appellant to discover, if we can, what negligent act or omission of duty the defendant company is chargeable with in connection with ⁸⁷¹ this unfortunate accident, and if such act or omission be found, to ascertain where it occurred.

It seems that on the 13th of March, 1888, Donnelly, the superintendent of the New Jersey division, telegraphed from New Market to Kinsey, the master mechanic at Easton, that he would be glad to have all the men that could be spared "to help open the road"; that it would be necessary to shovel all the cuts between Phillipsburg and New Market, and that it might be several days before the road could be opened. He also said in his telegram that the men "should be sent out with provisions enough for two days at least, and have four engines coupled together, two turned each way, with jacks and blocking," etc. In compliance with this request or order, a train was made up the next morning consisting of four engines and two tool cars, and having upon it four conductors, four engineers, four firemen, and two hundred laborers. It also carried provisions for two days and shovels and other appliances suitable for the work of clearing the tracks of snow and other obstructions. It does not admit of reasonable doubt that every man on this train knew that the road was so blocked by snowdrifts that the regular passenger and freight trains could not be moved over it, and that his train was organized for the express purpose of opening the road for them

by removing the snow from the tracks. The manner in which the train was made up, equipped, and manned was in itself notice of the purpose for which it was sent out, of the obstructions to be met and overcome, and of the kind of work to be done by the men upon it. In addition to the notice thus conveyed we learn from the evidence that Isaac Pixley, who was Derr's fireman at the time of the accident, was directed to go out "with three other engines and open the road"; that Charles Kleckner, who was the engineer on the locomotive next to Derr's, received orders to "proceed to Phillipsburg and help clear the snow," and that William Laros, one of the conductors, was ordered "to report and go out with the snow trains." We learn, too, that, while at Phillipsburg, the men in charge of the train consulted as to the order in which the engines should move, and "came to the conclusion that it would be better to put the heavier engines on the lead on account of getting through the snow." In short, a careful study of the whole testimony forces the conviction that none knew better than the trainmen the condition of ³⁷² the road, the nature of the work on which they entered, and the dangers incident to it. Most of them had been in the service of the defendant company many years, and were familiar with every part of the road on which their train was running at the time of the accident. They knew where all the cuts were, and, from their experience and observation in railroading, were aware that the greatest obstructions created by the snowstorm would be found in them. It may be conceded that they did not know the exact location and size of every snowdrift they would have to remove or cut a way through in opening the road. This was information which could only be obtained in the prosecution of the work for which they were sent out. All that we have said in reference to the knowledge of the trainmen generally is especially applicable to Derr, who was an engineer on the Easton and Amboy division of the road for four years. It will thus be seen that the risks involved in the work of opening the road were intelligently assumed by him. In order to recover in this action it was necessary for the appellant to show negligence on the part of the defendant company in connection with this work, and as she has failed to submit evidence which warrants an inference of such negligence, the nonsuit must be sustained.

The specifications of error are overruled.

Judgment affirmed.

NEGLIGENCE—RECOVERY FOR INJURY RECEIVED IN ANOTHER STATE.— There can be no recovery in one state for injury received through negligence in another, unless the infliction of the injury is actionable under the law of the state where it is sustained: *Alabama etc. R. R. Co. v. Carroll*, 97 Ala. 126, *ante* 163, and note with the cases collected; but if the statutes of another state give a right of action for injuries to the person, whether they instantaneously result in death or not, and declare that the right shall survive to the executor or administrator, an action may be maintained by the administrator in this state for injuries suffered in the other by his intestate from the negligence of a railway corporation, and resulting in death, if the decedent was domiciled in this state at the time of his injury and death: *Higgins v. Central New England etc. R. R. Co.*, 155 Mass. 176; 31 Am. St. Rep. 544, and note. See further on this subject the extended note to *Atwell v. Huntington*, 14 Am. St. Rep. 350.

HERMAN v. SOMERS.

[158 PENNSYLVANIA STATE, 424.]

VENDOR AND VENDEE—COVENANT FOR MARKETABLE TITLE.—A covenant in a contract for the sale of land that the property is "to be free from all liens and encumbrances" and the purchase money is "to be refunded if title should not prove good on examination of records, or cannot be made good," is equivalent to a covenant to convey a good marketable title.

VENDOR AND VENDEE—MARKETABLE TITLE in equity is one in which there is no doubt involved either as to matter of law or fact. If there is color of outstanding title which may prove substantial, though there is not enough in evidence to enable the chancellor to say so, a purchaser is not compelled to take it and encounter the hazard of litigation.

VENDOR AND VENDEE—MARKETABLE TITLE—RESCISSION OF CONTRACT OF PURCHASE.—A vendee may rescind his contract for the purchase of land when he is entitled to a marketable title and the vendor acquired the land at sheriff's sale while the vendor's husband fraudulently procured such sale to defeat the rights of the real owners who had recovered a judgment in ejectment against him and had conveyed to third persons.

ACTION to rescind a contract for the purchase of land and to recover from the defendants as agents of James and Ellen Leach, the vendors, the purchase money paid under the contract. James Leach never had any legal title to the land. Mary Johnston, from whose administrator he had purchased it in 1882, had a life estate only. Mrs. Johnston's first husband, Robert Calhoun, died intestate seised of the land, leaving a son since dead from whom Mrs. Johnston is alleged to have inherited. The collateral heirs of said Calhoun brought ejectment against Leach in 1884, and recovered judgment. In December, 1885, one of said ejectment plaintiffs obtained partition of the land, and it was sold to Robert Smith and E. Kelly, and this title is still outstanding. In March, 1888,

the city of Allegheny filed a lien against Leach for the cost of a sewer, and proceeded to sell the land on September 7, 1888. At this sale Ellen Leach, the wife of James Leach, was the purchaser for the sum of three hundred and twenty-five dollars. After the costs had been collected the balance of the purchase money was distributed to said Leach, who had originally furnished the purchase money to his wife. Said lien sale was procured by Leach in collusion with the city with fraudulent intent to cut off the title of the Calhoun heirs, and objections to such sale, and to an acknowledgment of the deed executed in pursuance thereof, were filed by them, and supported by affidavit showing that Mrs. Leach had full knowledge of their suit in ejectment and proceedings thereunder. Judgment for plaintiff. Defendants appealed.

J. C. Dicken, for the appellants.

C. W. Dahlinger, for the appellee.

⁴²⁷ Per CURIAM. According to express terms of the contract of sale, the property was "to be free from all liens and encumbrances," and the hand money was "to be refunded if title should not prove good on examination of records, or cannot be made good." ⁴²⁸ This is equivalent to a covenant to convey a good marketable title. In equity a marketable title is one in which there is no doubt involved, either as to matter of law or fact: *Dalzell v. Crawford*, 1 Parsons, Equity Cases, 45; *Nicol v. Carr*, 35 Pa. St. 382; *Swayne v. Lyon*, 67 Pa. St. 439. In *Speakman v. Forepaugh*, 44 Pa. St. 373, it was said: "Every title is doubtful which invites or exposes the party holding it to litigation. If there be color of outstanding title which may prove substantial—though there is not enough in evidence to enable the chancellor to say so—a purchaser will not be held to take it and encounter the hazard of litigation." The testimony in this case is quite sufficient to bring it within the principle recognized in these cases, and hence there was no error in affirming plaintiff's first, second, and third points, or in charging the jury as requested in his fourth point, that, under the law and evidence, the title to the property in question was not marketable, and their verdict must be for the plaintiff; nor was there any error in refusing to affirm defendants' first and second points, or in charging the jury as complained of in the seventh specification. Neither of the specifications of error is sustained.

Judgment affirmed.

VENDOR AND PURCHASER—MARKETABLE TITLE.—A marketable title is one that is free from reasonable doubt, one that is free from encumbrances and defects: *Vought v. Williams*, 120 N. Y. 253; 17 Am. St. Rep. 634, and note; *Hedderly v. Johnson*, 42 Minn. 443; 18 Am. St. Rep. 521. A marketable title is one which can be sold to a reasonable purchaser, or mortgaged to a person of reasonable prudence: *Moore v. Williams*, 115 N. Y. 586; 12 Am. St. Rep. 844, and note. See, also, *Turner v. McDonald*, 76 Cal. 177; 9 Am. St. Rep. 189.

VENDOR AND PURCHASER—DEFECTS IN TITLE—RESCISSION.—If at the time of the contract for the sale of land the vendor cannot convey a perfect title because of an outstanding defect unknown to the vendee, the latter may rescind the contract: *Tucker v. Woods*, 12 Johns. 190; 7 Am. Dec. 305; *Judson v. Wass*, 11 Johns. 525; 6 Am. Dec. 392. If a vendor fails for a great length of time to make title according to his bond, the purchaser may sue in equity for a rescission of the contract: *Humble v. Hinkson*, 3 A. K. Marsh. 468; 13 Am. Dec. 195. See further the note to *Hampton v. Speck-nagle*, 11 Am. Dec. 709.

BARHIGHT v. TAMMANY.

[158 PENNSYLVANIA STATE, 545.]

MALICIOUS PROSECUTION—PROBABLE CAUSE—BURDEN OF PROOF.—If one accused of crime is discharged by the examining magistrate and brings an action for malicious prosecution against the prosecutor the burden of proving probable cause is on the latter.

MALICIOUS PROSECUTION—MALICE AND PROBABLE CAUSE WHEN QUESTION FOR JURY.—If in an action for malicious prosecution plaintiff's evidence shows malice and want of probable cause, while defendant's evidence shows directly the contrary, the jurymen are the sole judges of the credibility to be attached to the evidence as introduced, and they should be so instructed by the court.

MALICIOUS PROSECUTION—ADVICE OF COUNSEL which constitutes a defense to an action for malicious prosecution must rest on an honest and full presentation to counsel of all the facts within the knowledge of the prosecutor, or which he has reasonable ground for believing he is able to prove. An incomplete and unfair statement warrants an inference that the advice was sought as a mere cover for the prosecution, and an opinion based on such statement is an unsatisfactory reply to evidence of malice and want of probable cause.

MALICIOUS PROSECUTION—LEGAL ADVICE AS DEFENSE.—Legal advice sought, received, and acted upon, after a truthful and fair statement of the facts as understood by the prosecutor, is a defense to an action for malicious prosecution. It is available when the plaintiff has made a *prima facie* case of malice and want of probable cause, but it is an affirmative defense, and the burden of proving it is on the defendant.

MALICIOUS PROSECUTION—ADVICE OF COUNSEL AS DEFENSE.—Any evasion or concealment by the prosecutor in his statement of the case to his counsel upon which the prosecution is founded, or any failure on his part to make a full disclosure of the facts within his knowledge concerning it, deprives him of the protection which legal advice founded upon an honest, fair, and full presentation of the case affords when he is sued for malicious prosecution.

G. L. Halsey, for the appellant.

Q. A. Gates, for the appellee.

⁵⁴⁹ **McCOLLUM, J.** On the 30th of December, 1889, Charles W. Tammany, appellant, made an information before an alderman of the city of Wilkes-Barre, in which he charged Lucinda Barhight, appellee, with the larceny of certain property belonging to him, to wit: "One cupboard and about twenty-five yards of carpet of the value of about thirty dollars." A warrant was issued on which the appellee was arrested and brought before the magistrate the same day. As the appellant was not present the hearing was postponed and the appellee committed to the county prison, where she was detained three days, when she was again brought before the magistrate, and, as appears by his record, was "discharged for want of sufficient evidence." The appellee then brought this action against the appellant for malicious prosecution, and recovered a judgment against him in the court below for one hundred dollars, from which he appealed. It is not necessary, in this opinion, to refer in detail to the evidence introduced by the appellee to sustain her averment that the prosecution against her was instituted by the appellant maliciously and without probable cause, or to make a like reference to the evidence submitted by him in answer to it. All the specifications of error are founded on the instructions to the jury, and if these were adapted to the evidence in the case and in accord with the well-settled principles which govern actions ⁵⁵⁰ of this character, the judgment must be affirmed. The instructions in relation to the burden of proof were in harmony with these principles and such as were demanded by the evidence. The proceedings before the magistrate cast upon the appellant the burden of showing probable cause for charging the appellee with the crime of larceny, and what was said in reference to this burden by the learned judge of the court below, in his general charge and his answers to the points submitted to him, were directly in line with the decisions of this court. When one accused of crime has been discharged by the examining magistrate, and brings an action for malicious prosecution against the prosecutor, the burden of proving probable cause is on the defendant: *Smith v. Ege*, 52 Pa. St. 419; *Orr v. Seiler*, 1 Pennyp. 445; *Bernar v. Dunlap*, 94 Pa. St. 329. There is no substantial ground for the complaint that the charge was inadequate. The principles governing the action

were clearly and correctly stated in it. But the evidence submitted by the appellee showed that the prosecution was malicious and without probable cause, while the evidence submitted by the appellant showed the existence of probable cause, and the absence of malice on his part. This conflicting testimony was for the consideration of the jury, and what the learned judge said in reference to it amounted to an instruction that if the facts were as claimed by the appellee the verdict should be in her favor, and if they were as claimed by the appellant it should be against her. This instruction was quite as intelligible to the jury as if the learned judge had said that the testimony on the part of the appellant showed that there was probable cause for, and no malice in, the prosecution, or that the testimony on the part of the appellee showed that there was malice in it and a want of probable cause for it.

The instruction in relation to the advice of counsel was a lucid statement of the law upon the subject. It was for the jury to determine from the evidence whether the appellant had in good faith laid before his professional adviser all the facts within his knowledge in respect to the alleged appropriation of his property by the appellee, and whether in prosecuting her for it he honestly followed advice founded upon information so communicated by him. It was not for the court, upon the evidence in this case, to say that he had done so. Advice so sought, received, ⁵⁵¹ and acted upon, constitutes a defense to an action for malicious prosecution.

It is available when the plaintiff has made a *prima facie* showing of a concurrence of malice and want of probable cause in the prosecution, but it is an affirmative defense, and it lies on the party who sets it up to establish it by his own or other testimony. Any evasion or concealment by the prosecutor in his statement of the case to his counsel, or any failure on his part to make a full disclosure of all the facts within his knowledge concerning it, will deprive him of the protection which advice founded upon an honest, fair, and full presentation of the case affords. An incomplete and unfair statement warrants an inference that the advice was sought as "a mere cover for the prosecution, and an opinion based on such statement is an unsatisfactory reply to evidence of malice and want of probable cause. The legal advice which constitutes a defense to an action for malicious prosecution must rest on an honest and full presentation to counsel of all the facts within the knowledge of the prosecutor, or which he has rea-

sonable ground for believing he is able to prove. In this case the appellant testified that the advice was obtained on his statement that the appellee had his property and denied having it. His counsel testified that the appellant gave him to understand that she had fraudulently taken it, and that his advice to prosecute for larceny was based on the theory that she had stealthily possessed herself of the property and denied possession of it. The undisputed evidence was that the appellee bought the property of her daughter and openly took possession of it. In view of this evidence, and the further fact that the conduct of the appellant was at least consistent with a purpose on his part to use criminal process against the appellee as a means of compelling payment of the alleged balance due from her daughter on the so-called lease, it was certainly pertinent for the jury to inquire whether the advice was obtained upon a truthful and fair statement of the facts as he understood them.

The specifications of error are overruled.

Judgment affirmed.

MALICIOUS PROSECUTION—PROBABLE CAUSE—BURDEN OF PROOF.—The burden of proof of probable cause must be assumed by the defendant if the plaintiff was tried and acquitted of the offense charged: *Lunsford v. Dietrich*, 93 Ala. 565; 30 Am. St. Rep. 79, and note. Having pleaded justification, the burden of proof is upon the defendant that he acted upon probable cause: *Sibley v. Lay*, 44 La. Ann. 936. The burden of proof cannot be shifted from the plaintiff to the defendant by a general traverse, or by a specific plea denying malice and averring facts showing probable cause: *Lucas v. Hunt*, 91 Ky. 279.

MALICIOUS PROSECUTION—MALICE AND PROBABLE CAUSE—WHEN QUESTION FOR JURY.—In an action for malicious prosecution, whether the proofs established the facts relied upon as constituting probable cause, is a question for the jury: *Mahaffey v. Byers*, 151 Pa. St. 92; *Gurley v. Tomkins*, 17 Col. 437; *Leahy v. March*, 155 Pa. St. 458; *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. Rep. 174, and note; extended note to *Ross v. Hixon*, 26 Am. St. Rep. 141-143.

MALICIOUS PROSECUTION.—ADVICE OF COUNSEL AS A DEFENSE: See the extended note to *Ross v. Hixon*, 26 Am. St. Rep. 143-148. In a malicious prosecution, where the defendant has laid all the facts before counsel, and has acted in good faith upon the advice given, this exonerates him from liability: *Adams v. Richnelt*, 126 Ind. 210; 22 Am. St. Rep. 576, and note; *Jackson v. Linnington*, 47 Kan. 396; 27 Am. St. Rep. 300, and note; *Newfeld v. Rodeminski*, 144 Ill. 83; *Perry v. Sulzer*, 92 Mich. 72. Advice by a prosecuting attorney based upon false statements of the defendant is no defense in a suit for malicious prosecution: *Peterson v. Toner*, 80 Mich. 350. A defendant who undertakes to overcome the presumption of malice by showing that he consulted counsel before undertaking the prosecution, must also show that he fully and fairly stated his whole case to the counsel: *Leahy v. March*, 155 Pa. St. 458; *McClafferty v. Philp*, 151 Pa. St. 86.

TAYLOR v. BELL.

[158 PENNSYLVANIA STATE, 651.]

WILLS—CONSTRUCTION OF DEVISE—LIFE ESTATE OR FEE.—A testamentary devise as follows: “to my beloved wife I allow the use as she may deem best the residue of my estate for her own advantage, and at her death, if any of it remain, to be equally divided between my three children,” followed by a provision in the will that the residuary real estate devised to the wife is subject to sale for the payment of the testator’s debts, if that should be necessary, in preference to the sale of real estate devised to one of the children, vests in the testator’s widow only a life estate in the residuary realty devised to her.

J. N. Banks, for the appellant.

D. B. Taylor and S. M. Jack, for the appellee.

652 **GREEN, J.** The clause in the will of Robert C. Taylor under which his widow, the present plaintiff, claims title, is in these words, “To my beloved wife I allow the use as she may deem best the residue of my estate for her own advantage, and at her death, if any of it remain, to be equally divided between my three children, Alexander, John, and Alice.”

Upon a careful examination of the rather numerous decisions upon this class of cases, we feel constrained to differ with the learned judge of the court below, and to hold that the interpretation of this will is controlled by our rulings in *Follweiler’s Appeal*, 102 Pa. St. 581, which it closely resembles, *Cox v. Sims*, 125 Pa. St. 522, and cases kindred to them. In *Follweiler’s Appeal* the residuary clause of the will gave the whole residue of the estate to the widow, “to keep and enjoy during her lifetime, and after her death what shall be left shall be divided equally, my heirs and her heirs, share and share alike.” The right “to keep and enjoy during her lifetime” and the right “to use as she may deem best for her own advantage,” terminable at her death, are practically identical in any legal sense, as they are in a merely physical sense. We can see no difference between 653 them in considering what was the character of these two defined rights in these two cases. In all other respects these two testamentary grants are precisely alike. There was no power of alienation or testamentary disposal conferred upon the widow in either case. There was an express limitation over in both cases, and the devisees in remainder in both take their title directly from the testator under the same will, and the same clause of the will, in each case, which creates the life interest

of the widow. So far as any implication of a fee in the widow arises out of the grant of the right to "keep and enjoy" in the one case, and "to use as she may deem best for her own advantage" in the other, there is no difference. Both these rights end with the life of the widow, the one, by express limitation "during her lifetime" and the other by the devise over "at her death" to designated devisees.

In the *Follweiler* case the ultimate words were, "and after her death what shall be left shall be divided equally, my heirs and her heirs, share and share alike." In the present case these words are, "and at her death, if any of it remain, to be equally divided between my three children, Alexander, John, and Alice." No larger implication, as to the estate of the widow, arises in the one case than in the other. We think clearly the two cases are precisely similar in all essential particulars. In delivering the opinion in the *Follweiler* case, Mr. Justice Trunkey said: "Primarily the land is given to her 'to keep and enjoy during her lifetime.' The will works no conversion. The executors are not authorized to sell the land under any circumstances; and no power to dispose of it is given to the life tenant. After her death it is given to the testator's heirs and his wife's heirs, share and share alike, and, as already remarked, the heirs of each are collateral. . . . No case has been cited by the able counsel for the appellant which can be wrested into a precedent for construing the language of this will to vest a fee in her." All of this language is precisely applicable to the case at bar, and in our judgment disposes of the present contention. There is this difference in favor of the ruling in this case. Under the will of plaintiff's testator the residuary real estate devised to the widow is subject to be sold for the payment of debts, if that should be necessary, in preference to selling the other real estate which was devised to the testator's daughter Alice. The will says: "If it be necessary ⁶⁵⁴ to pay my debts, and the amount above devised to my mother (\$1,000), that my real estate will need to be sold, that that is devised to Alice shall be reserved for her." So that it is clear the testator did not intend that an unqualified fee should pass to the widow under the grant to her of a right to use the land for her own best advantage.

The case of *Cox v. Sims*, 125 Pa. St. 522, decided in 1889, followed *Follweiler's Appeal*, 102 Pa. St. 581, and was disposed of upon the same line of reasoning. The words of the

will in that case are a little stronger in favor of a life estate only, in the wife, than in either the Follweiler's case, or in this. But the language from which it was claimed that a fee should be implied in the widow was rather stronger in them than here. The will gave the widow the whole of the residue, real and personal, just as here, "to have and to hold the same for and during the whole period of her natural life, and from and immediately after the death of my said wife all the property hereby devised or bequeathed to her as aforesaid, or so much thereof as may remain unexpended, I give, devise, and bequeath unto my beloved children," naming them. It was claimed that the widow took a fee under the implied power to expend the principal, but we held, reversing the court below, that the words were used in describing the devise over to the children, and not describing the widow's estate, and that they were, at any rate, only applicable to the personal estate, as was held in *Fox's Appeal*, 99 Pa. St. 382, and in *Follweiler's Appeal*, 102 Pa. St. 581, and that no power of sale was given to the widow. All these features concur in the present case and control its decision.

There are a number of decisions upon this general subject, most of which are cited either in the opinion of the learned court below, or in the argument of counsel for the appellee, which seem to support the contention of the appellee, but they will be found, upon careful examination, to be based upon the presence of a power to sell, or to dispose of, the property in the will creating the estate. We are saved the necessity of reviewing them in detail by the circumstance that this work has been very recently and exhaustively done by our brother Williams in an elaborate opinion in the case of *Boyle v. Boyle*, 152 Pa. St. 108, 34 Am. St. Rep. 629, in which the widow's right to a fee was sustained. The distinctions which divide the cases are most carefully presented, ⁶⁵⁵ so that it is not at all difficult to determine to which class a given case belongs. In the present case the widow has the right to use the residuary estate as she may deem best for her own advantage. This would entitle her to an absolute estate in the personality, because it includes a power of disposition, but under the decisions above cited it gives her only a life estate in the realty, with no power of sale or other disposition. That being so the plaintiff cannot make a good title to the defendant, and the defendant is not bound to accept the deed tendered or to pay the purchase money.

The judgment is reversed, and judgment is now entered under the case stated in favor of the defendant with costs.

DEVISES—CONSTRUED TO VEST LIFE ESTATE IN WIFE.—If a will gives and devises to the testator's wife all his property, with power to sell or convey the same as she may see fit, but declares that whatever remains after her death, not specifically disposed of by her, is to be used for the benefit of his children, such will vests in her an estate for life with the power to convey by deed: *Kent v. Merriam*, 153 Mass. 137; 25 Am. St. Rep. 616. See *Olson v. Ladd*, 153 Mass. 126; 25 Am. St. Rep. 614, and note; *Larsen v. Johnson*, 78 Wis. 300; 23 Am. St. Rep. 404, and note, with the cases collected.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

LOMBARD INVESTMENT COMPANY v. CARTER.

[7 WASHINGTON, 4.]

STATUTE OF FRAUDS—AGREEMENT FOR SALE OF LANDS.—A letter from a general land agent of a railroad company to a settler upon its lands, assuring him that if he is the first settler thereon, continues to reside upon and improve such land until it shall be offered for sale, he will be entitled to the first privilege of purchase at an appraised valuation to be fixed without reference to the improvements, does not constitute a valid contract for the conveyance of the land which can be specifically enforced, although the condition as to settlement and improvement has been fully complied with.

Crow and Richardson, for the appellant.

Fenton, Henley and Fenton, and *C. F. Backus*, for the respondents.

⁴ **STILES, J.** This action was brought to foreclose two mortgages upon certain land in Spokane county. These mortgages were executed by Lemuel O. Carter and wife, on the twenty-fifth day of September, 1889, at which date the mortgagors had received from the Northern Pacific Railroad Company, then the owner of the land, a contract, in writing, to convey it, in consideration of the sum of six hundred and thirty-five dollars, over five hundred dollars of which was paid upon the delivery of the contract, and the balance of which was paid by the appellant in this ⁵ action out of the money loaned to Carter and wife. Pursuant to the contract made with Carter, the Northern Pacific Railroad Company executed and delivered its deed for the land in question,

which was delivered to Carter, and filed for record in the auditor's office of Spokane county, February 10, 1890.

The respondents Strong and wife defended against the proposed foreclosure by an allegation contained in a cross-complaint, that on the twenty-first day of April, 1884, they had entered upon, and taken possession of, the premises in controversy, by consent and permission of the Northern Pacific Railroad Company, and that immediately thereafter they commenced to make, and did make, valuable improvements thereon; and by the further allegation that on or about the eighteenth day of October, 1884, while still in the possession of the premises, Strong entered into a written contract with the Northern Pacific Railroad Company, wherein it was agreed between the parties that if Strong continued to reside upon and improve the land until the same should be offered for sale by the company, Strong should then, and in that event, be entitled to the first privilege of purchasing the land from the Northern Pacific Railroad Company, at the then valuation, exclusive of the improvements made by him. The cross-complaint further showed that Strong and wife had continued to live upon the land, and had made improvements thereon of the value of about one thousand dollars. The further allegations of the cross-complaint were, that the purchase made by Carter was with full knowledge of Strong's possession, and of his alleged right to purchase, and that the appellant and Carter contrived a scheme by which the Northern Pacific Railroad Company was deceived into selling the land to Carter; the appellant also being alleged to have had knowledge of the possession of Strong, and of all the facts relating to the alleged contract between him and the railroad company.

• We shall assume, for the purposes of this decision, that the cross-complaint stated sufficient facts for the purpose of raising the issue tried by the court, although the terms of the pleading were somewhat indefinite. We shall also assume it to have been a proven fact that at all times subsequent to April 21, 1884, Strong was in the actual, open, and notorious possession of this land, residing upon and cultivating it, until after Carter had procured his contract for the sale to him. Under such a state of things it is a well-established rule of law that where one is holding a valid contract for the sale of lands from the owner thereof, and is in possession of the land, if a third person takes the title from the owner, he is in posi-

tion to charge the grantee from the owner with knowledge of all his rights under his contract. This proposition is not controverted by appellant, and is held by all the authorities: 2 Pomeroy's Equity Jurisprudence, sec. 614.

The only vital question in this case then is, Did Strong have a valid contract with the Northern Pacific Railroad Company? To make a contract for the sale of lands, there must be an agreement in writing, subscribed by the party to be charged, subject to the well-known exceptions which in equity relieve the purchaser from his failure to obtain such a contract in compliance with the statute of frauds. As before stated, Strong's settlement upon this land was made April 21, 1884, and it was begun after receiving oral assurance from a real estate agent in the city of Spokane, who sometimes sold land for the Northern Pacific Railroad Company on commission, that if he should be the first settler upon any lands of the Northern Pacific Railroad Company at the time they came into market, the company would deal with him rather than with any other person choosing to buy that particular tract. But this agent had no authority to make any contract with the proposing purchasers of lands of the railroad company, and his statement to ⁷ Strong was nothing more than a statement of the general policy of the company. With this assurance, however, Strong went upon the land and established his residence there, made certain improvements, cultivated a portion of the tract, and took the crops which he raised. Subsequently, and about October 8, 1884, Strong addressed a letter to the general land agent of the railroad company, which is not in the record, but in which it appears that he made certain inquiries looking to a preference of himself as a purchaser. In response to that letter the company's agent, Paul Schulze, wrote as follows:

"October 18, 1884.

"*Mr. Walter Strong,*

"DEAR SIR: Answering yours of the 8th inst., I have to say that if you are the first settler upon the northeast quarter of section 5, tp. 27 n., r. 42 east, and if you continue to reside upon and improve said land until it shall be offered for sale, the same being strictly agricultural in character, you will be entitled to the first privilege of purchase at the appraised valuation, which will be fixed without reference to your improvements. The mere fact that another party has written a letter applying for the purchase of said land does

not in any way affect your rights in the premises. No rights can be acquired to lands of the company not in market, except by settlement upon or improvement thereof."

This was the document which Strong claims created a contract between him and the Northern Pacific Railroad Company for the sale of this tract of land, and his contention is that this letter was substantially an option given to Strong, which option contained the imposition of certain terms, viz., residence and improvement, upon the acceptance of which by Strong, by residence and improvement, the contract arose in his favor for the conveyance. While, for the sake of the argument, it will be fully conceded that such an option, when performed by the party to whom it is given, although there may be, under the terms of the contract, no obligation on the holder to perform any of the ^a conditions prescribed, constitutes a valid contract, when performed, and to enforce which a specific performance will be decreed, it remains also true that the option must be so definite and certain in its terms that it can be enforced in the same manner as an ordinary contract for the sale of land. We think it is very evident, upon the face of this letter, that it was not the intention of the agent of the railroad company, by it, to make any contract with Strong whatever; but, even if his intention had been otherwise, the paper is totally wanting in several of the necessary elements of such a contract. Treating improvement as a condition to be performed by Strong, the letter is totally silent as to what that improvement should be. It might be much or it might be little, and yet, if respondent's contention were recognized, he would be entitled to have his conveyance. But the absence of two absolutely necessary items of such a contract from this letter, viz., the price and the terms, would render it void under all circumstances. Besides which, the time when the contract was to be performed was not named, and the letter itself shows that that time was wholly indefinite, viz., when the lands should come into market; that is, whenever the Northern Pacific Railroad Company saw fit to offer them for sale. Comparing this letter with the contract which was enforced in a case which is cited by respondents (*Perkins v. Hadsell*, 50 Ill. 216), the deficiencies in the present case clearly appear; and, had Carter never interfered with the matter, Strong would have been in no position to enforce a specific performance against the railroad company when the land was offered for sale, which seems to have been

some time before Carter received his contract. Strong had the same right to apply to purchase the land that Carter did, and, from the interest taken by the railroad company in this case, it is more than likely that, had Strong's situation been made known to it before it contracted ⁹ with Carter, it would have given the former the preference; but it was under no obligation to do so, and its contract with Carter took it out of its power to deal with Strong concerning this land. Even had the railroad company chosen to recognize the correspondence between its land agent and Strong as a contract, the contract was void under the statute of frauds, and its sale to Carter operated as an election to avoid the contract, and Carter took the title: *Messmore v. Cunningham*, 78 Mich. 623. It follows that under whatever imputation the law would throw upon the appellant of knowledge as to Strong's rights from the fact that he was in possession of the land, that knowledge amounted to nothing more than information of a void contract, which was in no way binding upon it. The case seems to have been tried below somewhat upon the same theories as are cases where priority of settlement upon public lands of the United States is the deciding factor in suit to have the government patentees declared the trustees of the title for the actual first settlers. But all such cases depend upon statutes which give the priority of right to the priority of settlement—an element which is entirely wanting here. The general policy of the Northern Pacific Railroad Company regarding the disposal of its lands was not a law, and it was in nowise bound until a contract which would have prevailed between private persons was entered into.

It appears that before this action was commenced, Strong, in a suit in the superior court of Spokane county, had obtained a decree requiring Carter to convey this land to him upon repayment of the purchase money paid to the Northern Pacific Railroad Company by Carter, with interest. This amount had been, under the order of the court, paid into court for the use of Carter, and respondents contend that the appellant was bound to see that that money was appropriated to the payment of its mortgage; but there ¹⁰ was no such obligation upon the appellant. Appellant was named as a party to that suit, but was never served with process, and, for aught that appears, had no knowledge of the pendency of the action. Strong knew of the existence of appellant's mortgage, and it was his duty, if he desired to secure the appropriation

of the money paid as the purchase price of the land to the reduction of appellant's mortgage, to see to it that in some way that object was legally accomplished.

The judgment will be reversed, and remanded, with instructions to the court below to enter a decree foreclosing appellant's mortgages upon the lands covered thereby.

DUNBAR, C. J., and HOYT, ANDERS and SCOTT, JJ., concur.

VENDOR AND PURCHASER—STATUTE OF FRAUDS—SUFFICIENCY OF THE MEMORANDUM.—The statute of frauds is satisfied by a contract that can be extracted from correspondence: *Austin v. Davis*, 128 Ind. 472; 25 Am. St. Rep. 456, and note. A letter is a sufficient memorandum of a contract to bind a vendor, and subject him to an action for its breach, if there is no other difficulty in the way of the vendee: *Micell v. Burnett*, 4 Jones, 249; 69 Am. Dec. 744, and note. See the notes to *McGovern v. Hern*, 25 Am. St. Rep. 634; *Easton v. Montgomery*, 25 Am. St. Rep. 132, and the extended note to *Neaves v. North State Min. Co.*, 47 Am. Rep. 532.

SEATTLE AND MONTANA RAILWAY CO. v. STATE.

[7 WASHINGTON, 150.]

EMINENT DOMAIN—APPROPRIATION OF STATE LANDS.—State tide lands cannot be taken by a railroad company in the exercise of the right of eminent domain, unless there is either express or clearly implied authority to that effect contained in the statute relied upon as conferring such right.

EMINENT DOMAIN—DAMAGES FOR APPROPRIATION OF STATE LAND.—The state, as owner in fee of tide lands abutting on both sides of a lawful street, is entitled to damages for the occupation of such street for ordinary railroad purposes.

MUNICIPAL CORPORATIONS—POWER TO LAY OUT NEW STREETS OVER STATE TIDE LAND.—A statute authorizing a city to "project or extend its streets over and across any tide lands within its corporate limits, and along or across the harbor areas of such city," does not authorize such city to lay out a new street over state tide lands, but only to extend streets already in existence.

INTERSECTING RAILROADS—APPROPRIATIONS OF CROSSINGS.—The railway first constructed has the prior right to the right of way, and one which is subsequently constructed so as to cross, or parallel, the one already in existence must accommodate itself to the established way of the first. It cannot be constructed so as to overlap such right of way and existing tracks longitudinally, so that the first company cannot use its track during the operation of the road of the last company.

INTERSECTING RAILROADS—CROSSINGS IN STREET.—No railroad company is permitted to claim that tracks, no matter how numerous, when constructed lengthwise on a public street, constitute a part of its yard, so that they may not be crossed by a new railroad when there is reasonable necessity therefor. In such case, all that the railroad has is a per-

manent license, not coupled with any interest in, or ownership of, the land, or any contingency through which it may acquire the land.

EMINENT DOMAIN—INTERSECTING RAILROADS—NECESSITY FOR CROSSING MATTER FOR JUDICIAL DETERMINATION.—Under statutes providing that any railway may cross, intersect, join, and unite with any other railway before constructed, at any point in its route, and if the two companies cannot "agree on the compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined in the manner provided by law for the taking of lands for the construction of a railroad," and, if the court shall be satisfied, by competent proof, that the property sought to be taken is necessary for the purposes of the enterprise, it shall make an order for a jury, etc., the necessity for such connection, or crossing, is always a matter for judicial determination in the event of the failure of the companies to agree thereon, and the intersecting railway cannot determine this matter for itself, nor will the court declare a necessity for a crossing at a certain point desired by the new road, where it would greatly injure the senior road, and near by which the new road can pass without such injury, and with merely an additional expense.

EMINENT DOMAIN—INTERSECTING RAILROADS—PRACTICE.—Two or more intersecting railroads should show an attempt to agree upon connections and points of crossing before resort is had to judicial proceedings to condemn a right of way to cross by the later and intersecting road.

EMINENT DOMAIN—INTERSECTING RAILROADS—CONDEMNATION OF CROSSING.—A railway seeking to appropriate a right of way to cross the tracks of a railroad already in existence may, by stipulation tendered, bind itself to assume the burden of maintaining frogs and crossing apparatus.

W. C. Jones, attorney general, James A. Haight, Ashton and Chapman, and Andrew F. Burleigh, for the appellants.

Burke, Shepard, and Woods, for the respondent.

151 STILES, J. This was a proceeding for the condemnation of a right of way for respondent's railroad, and involves three different appellants: The state, the Columbia and Puget Sound Railroad Company, and the Northern Pacific Railroad Company. The right of way sought to be appropriated lies over land between the high and low water marks in Elliott bay, on the water front of the city of Seattle.

1. The state appeared by the attorney general, and moved to dismiss the proceeding as against it, on the ground that the court had no jurisdiction to entertain it, which motion was denied. We think the court erred in its ruling on this point, for the following reasons: The state is the owner of this land, and there is no authority, either express or implied, in the statutes for the taking of any part of it through exercise of the power of eminent domain. Our eminent domain act, as applied to railroads (General Statutes, sections 1569, 1570;

Code of Procedure, title 9, chapter 5), must be construed, as are all such acts, as having regard only to the taking of private property, unless there is either express or clearly implied authority to extend them further: *Lewis on Eminent Domain*, sec. 273; *State v. Anthoine*, 40 Me. 435; *Marblehead v. County Commrs.*, 5 Gray, 451; *Charleston v. County Commrs.*, 3 Met. 202; *Stevens v. Erie Ry. Co.*, 21 N. J. Eq. 259.

The respondent, we believe, concedes thus much, but it ¹⁵² claims to avoid the force of it by citing that portion of the Code of Procedure, section 649, providing for service of notice in condemnation cases, which reads as follows:

"In case the land, real estate, premises, or other property sought to be appropriated, is state, school, or county land, the notice shall be served on the auditor of the county in which the land is situated."

Tide lands are "state" lands in a certain sense—that is, they belong to the state; but in all the nomenclature of our constitution and statutes the latter term does not include the former. Articles 15 and 17 of the constitution treat of tide lands, while article 16 is devoted to school and granted, or state, lands. General Statutes, chapter 7, provided for a "state land commission," to whose supervision "all public lands now owned by or the title to which may hereafter vest in the state" was committed. But this sweeping term, "public lands," did not include school lands, tide lands, the harbor areas, the capitol grounds, nor any of the lands upon which the public institutions of the state are located, all of which are committed to the supervision of other boards or officers. As well might it be contended that because a railroad is authorized to enter upon and condemn "any" land for its tracks, depots, shops, roundhouses, etc., it could, by serving notice upon the auditor of Thurston county, take the entire ten acres upon which the state capitol stands for a depot and shops.

Thus much for construction of the term "state lands." But it would seem that the legislature, in expressly conferring upon railroad companies the right to construct their lines "across, along, or upon any river, stream of water, watercourse, which the route of such railway shall intersect or touch" (*Gen. Stats.*, sec. 1572), had gone as far as it intended in this direction. True, this law was passed in 1888 (*Laws*, p. 64, sec. 3), when the territorial legislature had not full, or perhaps any, jurisdiction over ¹⁵³ such lands as that in question; but no change has been made in the law, and we can

only interpret it as we find it. What it meant then it means now; the change in the conditions from territorial times to the present has not changed the meaning or intent of the statute.

The argument from convenience is strongly urged upon us, and it is said that unless tide lands are thus subject to condemnation, much embarrassment will ensue to the building of railroads, because the situation of the land in many cases, and particularly at this place, is such that no land is available for tracks and railway terminal facilities except along the shores of tide waters and upon the tide flats. The state of Washington, by its constitution, has taken an advanced and decided position with regard to navigable waters and the lands beneath them; a position which is scarcely anywhere paralleled by the written law. It proposes to determine for itself what shall be the disposition of these lands, and how the facilities for transportation upon, to, and from its great natural water highways shall be managed and enjoyed. It will, doubtless, encourage and invite the building of railways so as to take advantage of these lands and waters; but it proposes to say how that shall be done, and when and by whom. All railways built upon its tide lands, and all which may be built there, until it shall have provided for them by law, will be there at sufferance, subject to be removed or rearranged as the legislature, subject to the constitution, may ordain. It has harbor lines to lay in front of the city of Seattle, which must be inviolate, and the lands between which must be inalienable, except as the constitution permits; and it has its own policy, as announced in legislation already enacted, concerning the disposal of the other tide lands.

2. The disposition of the case, at this point, complicated with another matter, viz., the fact that the place over which this condemnation was sought was within what is ¹⁵⁴ known as "Railroad avenue," a street laid out by the city council of Seattle, in 1889, before the adoption of the constitution, and perpetuated in the freeholders' charter of 1890.

The court below held that inasmuch as this was a street authorized to be laid out by the constitution and statutes of the state, the state, although a proper and necessary party to this proceeding, was not entitled to any consideration in the assessment of damages for the laying of the railroad along the street. We are unable to see why the state, as owner of the fee and of lands abutting on both sides of the street, should

not be entitled to damages for the occupation of the street for ordinary railroad purposes, even conceding this to be a lawful street, unless we were to adopt the theory that such occupation is not an additional burden for which the abutting owner may claim damages, a theory which could hardly stand under our constitutional provisions against the taking or damaging of property without compensation, as the state would certainly be entitled to rank as a private owner in such a case: *Hatch v. Tacoma etc. R. R. Co.*, 6 Wash. 1. Neither the constitution nor the statute assumes to confer the fee of any tide lands for streets; an easement only is given.

The court's ruling last referred to, however, would not cut an important figure in this case, in view of a dismissal as to the state. But the main question is left whether Railroad avenue has any legal existence, and this question vitally concerns the other parties to the proceeding.

This street was declared to be a public street of the city immediately after the fire of 1889, when all of the ground covered by it was free from buildings or other structures, and it has been kept free ever since, although it occupies some of the space where such structures formerly stood. It begins at a point on the northeasterly shore of Elliott ¹⁵⁵ bay, and skirts the bay for several miles, much in the form of the letter U. It does not touch the upland at any point except where it begins, but keeps mostly within the low tide line until it passes south of King street, where the land recedes to the south and east, forming a large inner bay, which the street crosses. It is one hundred and twenty feet wide, and is not the extension of any city street. While it was laid out as, and declared to be, a public street, its real purpose was undoubtedly to afford an open space for the use of railroads, and its entire width, except space for sidewalks, has been covered by specific grants to railroad companies of a certain number of feet each. When fully occupied, in accordance with the terms of these charters, the public will have no practical enjoyment of any part of it except at street crossings.

Ordinarily a city has no power to take land merely for the purpose of furnishing a railroad company with a right of way. Railroad companies are endowed with the same power of eminent domain which cities have, to enable them to take care of themselves. Neither corporation can make use of its power to condemn land for the use of the other: *Chicago etc. Ry. Co. v. Galt*, 133 Ill. 657; *Ligare v. Chicago*,

139 Ill. 46; 32 Am. St. Rep. 179. But the application of this rule to the present case may not be admitted, inasmuch as this street was not procured by condemnation.

Waiving the fact that the ordinance establishing Railroad avenue at the place in controversy was passed in July, 1889, when the city of Seattle had no jurisdiction to extend streets over tide lands, we shall treat the declarations of the charter of 1890 as, in all respects, a formally sufficient exercise of the authority conferred upon cities to extend streets over tide lands, even if the ordinance obtained no force at the adoption of the constitution.

The article of the constitution on harbors and tide ¹⁵ waters (15), after providing for the reservation of an outer harbor, area not less than fifty, nor more than six, hundred feet wide along the water front of all incorporated cities "for landings, wharves, streets, and other conveniences of navigation and commerce," and further providing for the leasing of rights to build structures in aid of commerce upon the harbor areas, contains this language:

"Sec. 8. Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided."

This provision is claimed to be self-executing, though it would seem that such a construction might be very embarrassing when the matter of the disposal of the inner tide lands comes up (that matter being committed entirely to the control of the legislature), since the state's officers can have no official knowledge of any city ordinance laying out streets, unless provision is made for the authentication of such ordinances and their deposit among the records of the state. But passing this point, the legislature, in the act of March 24, 1890 (Laws, page 223, section 5, subdivision 37), providing for the government of cities of twenty thousand inhabitants, confirmed the right granted in the constitution, in its enumeration of the powers of such cities, in these words:

"Thirty-seventh. To project or extend its streets over and across any tide lands within its corporate limits, and along or across the harbor areas of such city, in such manner as will best promote the interests of commerce."

In *Columbia etc. R. R. Co. v. Seattle*, 6 Wash. 332, we construed this statute, as it reads, to enlarge the authority expressed in the constitution, so as to authorize a city to extend its streets across any tide lands, although the streets extended might

never touch the harbor area. But now the position is taken that this statute covers the laying out of a street at the will of a city of the ¹⁵⁷ first class, in any direction and to any extent, whether there was a street to begin with or not. If that is the construction, it must be found within the language of the statute, or by a plain implication therefrom. The constitutional provision will clearly not admit of any such construction, for the words there used clearly imply that the only purpose sought to be subserved was to enable the public to freely reach the harbor area, where, of necessity, commerce between the land and the water must meet. The statute broadens the right to extend streets, and will be enforced as enacted. But in searching for the authority claimed by the respondent we note: 1. That the power is to extend or project streets, and by those two words we understand the legislature to have meant the same thing. They are common words, and when applied to an existing thing, like a street, they mean to construct it in the same direction, and with the same width; 2. They are used with reference to existing things, since what a city may extend is its streets; 3. The power is exhausted with the extension of existing streets.

Counsel pleads for a common sense construction of the statute, and suggests the absurdity of a case where the harbor area is a half mile or more from the shore, and only streets to it can be laid out, because the city is so situated that there can be no streets to extend crosswise. We admit the absurdity that would occur if such a state of things were left to continue for any great length of time. But we submit, that we have exhausted the sense of this statute, common and all, when we have read it according to its plain and unmistakable language; and we can only repeat what has been said before, that this matter is all in the hands of the legislature, which will, no doubt, remedy any absurdities which may result from the administration of this law as it was enacted. We may, perhaps, be permitted to doubt, however, whether the legislature will ever, ¹⁵⁸ advisedly, authorize the opening of such a street as this one seems to be, in a portion of its length, and the surrender of it bodily to three or four railroad companies in specific grants, to the practical exclusion of all other possible railroads from the city, except as they may pay tribute to those already in possession.

This street was laid out one hundred and twenty feet wide, which is an unusual width, and perhaps a greater width than

that of most of the city's streets; but if one hundred and twenty feet, why not two hundred, or as great a width as the city may determine? And if any action of this kind which the city may take for the benefit of railroad companies is to be held binding upon the state, why not go further and claim that where the route of this street passes to the southward over tide flats a mile or more wide, it might be widened indefinitely so that broad ground would be furnished for sidetracks? It is said in this record that the respondent has acquired one hundred and forty acres of these tide flats for its terminal purposes, by paying for them, but the principle which it invokes as against the state would have applied almost as well had the city extended another street over that whole area, and then given it a franchise to lay tracks across it. It is not the business of municipal corporations either to build railroads or to specially facilitate railroad companies. They have the power to regulate them, and nothing more: Gen. Stats., sec. 520, subd. 9.

Having disposed of the state's part of this case, we now turn to the other appellants.

3. The respondent is constructing a new railroad, which, together with other allied roads, will constitute the main line of the Great Northern railway system extending from St. Paul, Minnesota, and West Superior, Wisconsin, to the city of Seattle. It will need, and has already arranged for, large terminal and repairing and building facilities at Seattle, a part of which are to the north of the city, and the remainder ¹⁵⁰ are to be at a distance of some five miles from the others, at the south. Ground for a passenger station has been obtained in the neighborhood of Jackson and Third streets, and the place intended for the freight-yards is the one hundred and forty acres above spoken of. Its franchise over Railroad avenue consists of a permission to use sixty feet in width of that street throughout its length for one or more tracks. This width will accommodate four tracks, and it is prepared to place them all at once. But when it reaches a point opposite the principal business portion of the city it comes upon ground which has, for many years, been wharfed over by the appellants, and used by them for railroad purposes, partly under ordinances of the city, one of which was under discussion in this court recently in the case of *Seattle v. Columbia etc. R. R. Co.*, 6 Wash. 379, and partly without any public authority shown by the record.

A little to the northward of Washington street the four tracks of the respondent curving to the westward meet two of the appellants' tracks curving slightly to the east. But for the fact that Railroad avenue, in the middle of which the respondent's tracks are, curves to the west at this point, there might be no necessity for any crossing or interference of the two sets of tracks, for by running its line some sixty feet to the west over private property and street crossings, respondent could lay its tracks substantially parallel to the others. Proceeding farther southward, the position of the appellants' two tracks is such, curving as they do from nearly the center of Railroad avenue at Washington street, to nearly the extreme west side of the avenue at Maine street, one block farther south, and back across the avenue to its extreme east side at Jackson street, still another block south, that within a distance of some seven hundred feet the respondent's two easterly tracks will cross the appellants' said two tracks twice, and its two westerly tracks, for about five hundred ¹⁰⁰ feet, will be upon and among said two tracks in such a manner, owing to appellants' curves, that no part of either track can be operated while any portion of another is in use. Add to this, that sixty feet south of Washington street the Columbia and Puget Sound Company, which uses the easterly of appellants' said two tracks, has a side track extending thence, parallel to its other track, to Jackson street and beyond; at Main street another sidetrack commences within respondent's west track and curves to the north and west to a wharf where the Columbia and Puget Sound Company has its passenger station; at Jackson street the Northern Pacific Company, beginning about the east line of Railroad avenue, runs out a spur crossing all of respondent's tracks going west to the wharf; and just north of Jackson street the Columbia and Puget Sound Company turns off two sidetracks near the east side of Railroad avenue, which tracks run to Washington street. The four main tracks of respondent do not touch the last-mentioned sidetracks, but at Maine street it is proposed to run two tracks from its two easterly main tracks, by about an eight per cent curve, easterly across appellant Columbia and Puget Sound Company's two sidetracks to its station grounds at Jackson and Third streets; and again, at King street, the Columbia and Puget Sound Company has two elevated coal-bunkers for delivering coal to ships, with several tracks on each. One of these bunkers is high enough to permit trains of cars passing under it,

but the other is not, and, in order that room may be made, it is proposed to rearrange and rebuild this bunker. There is no practical possibility of respondent's passing these bunkers to the southward in any other way than that proposed, unless its entire road be carried to the east past its passenger station and thence across appellants' tracks beyond where the bunker tracks commence. By keeping its tracks to the west, from Washington street south to about Jackson, respondent can avoid all of the complicated crossings; ¹⁶¹ and by that method, if it pursues the plan of continuing its four tracks southward, they will cross only the spur of the Columbia and Puget Sound Company to its wharf, the spur of the Northern Pacific Company to its wharf, and the elevated tracks to the coal-bunkers; all of which crossings will be nearly at right angles; and its passenger station tracks will need to cross but three of appellants' tracks once at Jackson street. The proof shows such an arrangement would be practically as easy a line for respondent to build and operate as the one proposed by it.

It was the testimony of every witness upon the stand in the case that the plan proposed by respondent made a most undesirable series of crossings, which are to be avoided, from a railroad point of view, by all means, if reasonably possible; and from the standpoint of the public, which has occasion to use the cross streets constantly, and which will furnish the patronage of all these railroad companies, the desirability of some other scheme is equally as great, for the constant dangers arising from the operation of a railroad traffic amounting to from two to four hundred train movements a day, according to the estimates of both parties, are too obvious for argument, occurring as they will in the heart of a busy city. As proposed, in the space of seven hundred feet there are twenty-three crossings at such a sharpness of angle that trains could not move upon some of the tracks which lie substantially parallel to each other without collision; and such facilities as the Columbia and Puget Sound Company has for the transaction of its local business in the city over the sidetracks mentioned to wagons would be almost entirely destroyed. Time and effort were expended in showing that this arrangement of tracks could be operated by means of interlocking switches and watchmen. Of course it could be done, and it does not take evidence to demonstrate it; but neither does it take evidence to show that it must be a most embarrassing

¹⁶³ situation to all the parties to the case, as well as to the public. Respondent suggested that, in so far as appellants' principal tracks were concerned, they could save the most of these crossings by moving their tracks over to the east side of Railroad avenue, where the city has voted them thirty feet of the avenue for that purpose; but it is well understood that one railroad company is not thus required to turn out of its established way for another coming into the same neighborhood later. The last comer must accommodate itself to the first, unless another contention of respondent, to be noticed later, is sustained. Probably much, perhaps all, of this difficulty has arisen from the attempted establishment of Railroad avenue and the assumption of the respondent that it could not travel outside of its limits; if so, an ordinance from the city is all that lies in the way of correcting the error.

Other matter in the case related to the comparative length of the respective railroads, and the traffic upon them past and prospective. Particular obloquy was sought to be cast upon the Columbia and Puget Sound road, because it is but a short line leading into some coal districts. But the statutes, and the administration of them by courts, do not make the right of eminent domain depend upon the length of a railroad or the amount of its business, and neither do the rights of a railroad company to keep what it is in good faith employing in such business as it has depend upon the like considerations. Those matters relate entirely to the damages to be allowed when it is proposed to cross their rights of way and tracks, a subject which this opinion will not discuss. The evidence clearly showed that neither of the appellants had such facilities in Seattle as they ought to have. These were somewhat awkwardly situated for the present and future operation of the roads, but they were put there when they had to serve a much smaller community, and the owners now have to operate ¹⁶³ them as best they may. All of this, however, does not detract from the right of these companies, as against the respondent, to have them remain as they are, undisturbed, except as its necessities, as an equal servant of the public, may require them to be trenched upon.

4. All this is certainly true, unless a point now to be noticed is sustained.

Section 1571 of the General Statutes reads as follows:

"Every corporation formed under this chapter for the construction of a railroad shall have the power to cross, intersect,

join, and unite its railway with any other railway before constructed at any point in its route, and upon the grounds of such other railway company, with the necessary turnouts, sidings, switches, and other conveniences in furtherance of the objects of its connections, and every corporation whose railway is or shall be hereafter intersected by any new railway shall unite with the corporation owning such new railway in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined in the manner provided by law for the taking of lands and other property which shall be necessary for the construction of its road."

Without any direct provision on the subject, one railroad must have the right to cross another, since the authority to build railroads from one part of the country to another could not be exercised without it, and the foregoing section merely regulates the manner of acquiring that right, with some others. Appellants contend, however, that the plan proposed by respondent is not entitled to be treated as a crossing, but as a longitudinal taking of their property devoted to public uses, and therefore not authorized either by the statute or by decisions of courts. It is a general rule that property which is already devoted to one public use, such as streets, parks, burying-grounds, state, ¹⁶⁴ county, and other public institutions, and railroad rights of way, station grounds, terminal grounds, yards, and the like, cannot be taken for another public use under the eminent domain laws, unless there is express or clearly implied statutory authority therefor. General Statutes, sections 1574, 1575, provides for cases where public grounds under the jurisdiction of counties and cities are necessary for railroad purposes, but there is nothing further in our statutes on that subject, except that Code Procedure, section 658, makes provision for the cases where it is necessary for a railroad to go through a cañon, pass, or defile already occupied by an earlier road.

The leading cases on this point are *Matter of Boston etc. R. R. Co.*, 53 N. Y. 575, concerning the taking of a public park, and *Matter of City of Buffalo*, 68 N. Y. 167, where lands used for railroad yards, tracks, and switches were sought to be taken for the building of a canal. Others are: *Baltimore etc. R. R. Co. v. North*, 103 Ind. 486; *In re Providence etc. R. R.*

Co., 17 R. I. 324; *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359; *Barre R. R. Co. v. Montpelier etc. R. R. Co.*, 61 Vt. 1; 15 Am. St. Rep. 877; *Appeal of Sharon Ry. Co.*, 122 Pa. St. 533; 9 Am. St. Rep. 133.

Appellants, as an inducement to the holding that the respondent's plan amounts to a longitudinal taking, ask a finding that the tracks to be crossed constitute a part of their yard, but we do not think they make out a case for the application of the rule as to yards. Certainly the Northern Pacific Company does not, for it has only one track and one switch leading to its wharf within the disputed ground, and as to both appellants, if the ordinance No. 262, sustained in *Columbia etc. R. R. Co. v. Seattle*, 6 Wash. 332, is to have any force in limiting its authority to lay tracks along the water front, they exhausted their right to lay tracks ¹⁶⁵ when they constructed a double track along the thirty foot right of way designated by the ordinance, for there was no mention of sidetracks in the ordinance except switches to wharves. As to the bunker tracks in King street, we think it safe to say that no railroad company should be permitted to claim that tracks, no matter how numerous, when constructed lengthwise upon a public street, constitute a part of its yard so that they may not be crossed by a new railroad where there is a reasonable necessity therefor. In such case all that the railroad has is a permanent license not coupled with any interest in, or ownership of, the land, or any contingency through which it may acquire the land.

But, notwithstanding we cannot find these to be yards of the appellants, it appears obvious from the maps on file in the case that as to the two westerly tracks of respondent there is much more than a crossing, or even a double crossing, for these two tracks lie lengthwise of the appellants' thirty foot right of way, or so nearly so that for a distance of more than four hundred feet it will be impracticable to operate either track or set of tracks when any one of the other tracks is in actual use, for want of passing room. We do not think that the creation of such a situation is what the law means when it gives one railroad the right to cross another, nor did any of the witnesses, some of whom were persons of large experience as engineers and practical railroad operators, speak of any such case existing. One instance of a double crossing caused by the straight track of one road intersecting the curved track of another at Dayton, Ohio, was

shown to have existed for some years ending fifteen years ago, but whether that case was brought about by condemnation proceedings or not did not appear. It was testified that there were some worse crossings than this proposed, all things considered, and the respondent, as an example, put in evidence a number ¹⁶⁶ of the *Chicago Engineering News*, containing a cut of a certain set of crossings in that city, at Stewart avenue and Twenty-first street. The crossings illustrated look complicated enough, certainly, but although five different railroads cross each other's tracks at that point, none of them having less than two, and one of them having four, tracks, there is not one double crossing, and there is no instance of a track or set of tracks overlaying and running parallel to, and upon the tracks of, another road. Moreover, the article to which the illustration belongs is devoted to a lamentation over the state of things in Chicago growing out of the numerous and complicated grade crossings of railroads (of which the Stewart avenue crossings is a fair sample), and to a consideration of the best method of doing away with what has become such a nuisance that the city of Chicago, as the article shows, has ordered the elevation of all such tracks at immense cost, or their removal from an area half a mile wide by two or three miles long. The argument to be drawn from this example is not favorable to this proposition considered as a crossing.

Concerning a proposed crossing very much less complicated than this, it was said in *Missouri etc. Ry. Co. v. Texas etc. Ry. Co.*, 10 Fed. Rep. 497: "The most common experience has little need of the testimony of experts to aid it in reaching the conclusion that such crossings as this application seeks to have restrained would be such a source of danger of collision in the transit of trains as could not be adequately compensated by any moneyed consideration, and such as should not be permitted except under the pressure of some paramount necessity for the service of the public convenience or of the state."

5. But passing this matter, the final position of the respondent is that, no matter what may be the character of the crossing, or how destructive of the property of the existing road, "it is for the corporation building the new line ¹⁶⁷ to select its route, as all the considerations bearing upon that selection dictate to it, and that if such route requires a crossing and recrossing of an existing line, the new corporation has

as much right under the statute to make such crossing and recrossing as it would have to make a single crossing," though it admits that an attempted crossing in bad faith, merely for the purpose of vexing the senior road, should not be permitted. This is to say that, so long as the junior road is not convicted of bad faith in its proposition, the courts have no right to inquire into the necessity of the place and manner of crossing, but must simply proceed with an assessment of damages, and this requires a study of our statutes on the subject.

Certainly all of the provisions of General Statutes, chapter 5, title 18, conferring these powers on railroad corporations, are to be exercised in the manner provided for in Code Procedure, chapter 6, title 9, known as the eminent domain act. Section 1571 of the former volume, concerning crossings, expressly makes the latter law applicable where the companies cannot agree. Now it is a provision of Code Procedure, section 651, that if at the time and place appointed for the hearing of the petition the court or judge shall be satisfied by competent proof "that the land, real estate, premises, or other property so sought to be appropriated are required and necessary for the purposes of such enterprise," he shall make an order for a jury. The mere statement of the petitioner is not, under this law, to be taken as final, but the court must be satisfied by "competent proof," and upon that and that alone he is authorized to act further. Nothing is said about cases where there may be a failure of such proof, but the plain implication follows that if the proof is not made the proceeding must fail. And this proof must satisfy the court that the condemnation as proposed is "required and necessary," a mere showing of convenience or lessening of expense not being sufficient: *Lewis*, 168 Eminent Domain, sec. 393; *Matter of New York Central R. R. Co.*, 66 N. Y. 407; *Appeal of Sharon Ry. Co.*, 122 Pa. St. 533; 9 Am. St. Rep. 133; *In re St. Paul etc Ry. Co.*, 37 Minn. 164.

The same rule applies to a crossing, and according to the record the respondent must have been proceeding in the court below in exact accordance with it; for it voluntarily began the case by offering proof to sustain the claim that the crossing proposed was necessary, and some hundreds of pages of testimony are devoted to nothing else. But respondent's claim goes further, and asserts that if there exists a necessity for it to proceed in the way it has laid out, the court is not to consider the convenience of the railroad to be crossed or the

practicability of some other means of accomplishing the same purpose. Plainly, however, if the junior road proposes to cross at a place or in a manner which will be disproportionately injurious to the senior road, and there be near by some other place where the junior road can pass and go on its way without any crossing at all, it must follow that there is no necessity for the crossing; or if there be some other point or means of crossing imposing less cost and difficulty of operation to the senior road, and merely additional expense to the junior, the like want of necessity is evident.

Respondent does not suggest what disposition is to be made of that portion of General Statutes, section 1571, which provides that "if two corporations cannot agree upon . . . the points and manner of such crossings . . . the same shall be ascertained and determined in the manner provided by law for the taking of lands." But it is very important, and, it seems to us, is decisive of this whole matter; and it is especially pertinent here, because there must be some crossing of appellants' tracks to enable respondent to prosecute its enterprise. The matter of the points and manner of crossing—the place where, and ¹⁶⁰ whether under, over, or at grade—is to be decided upon the application to the court, and by the court, since it is an exercise of its equitable powers: *Chicago etc. R. R. Co. v. Chicago & Pac. R. R. Co.*, 6 Biss. 219; *Humeston etc. Ry. Co. v. Chicago etc. Ry. Co.*, 74 Iowa, 554.

Lake Shore etc. Ry. Co. v. Chicago etc. R. R. Co., 97 Ill. 506, is cited in support of the contrary view, to the effect that the junior road can determine the point of crossing for itself, so long as it is willing to pay for the damage it does, which was assessed in *Lake Shore etc. Ry. Co. v. Chicago etc. R. R. Co.*, 100 Ill. 21. In the former case the court was construing a statute in the exact words of our General Statutes, section 1571, with this important difference, that whereas our statute provides that where there is no agreement between two corporations as to the points and manner of crossing "the same shall be ascertained and determined in the manner provided by law for the taking of lands," etc., the Illinois statute merely provided that "the same shall be ascertained and determined in manner prescribed by law": Stats. of Ill., 1885, p. 1914. Moreover, the eminent domain act there under discussion did not contain any provision requiring the court to be satisfied of the necessity of the proposed taking: Stats. of

Ill., 1885, p. 1041 et seq. Counsel in the case were contending that, although the authority to cross was expressly conferred by the statute, it was inoperative, because it was a taking of property which could not be taken without compensation, and no law had been enacted for the ascertainment of such compensation or the determination of the points and manner of crossing. This necessitated the court to say that, if the contention set up were sustained, it must result that, in Illinois, no railroad could cross another at any point, and it held that the eminent domain act was adapted and intended to ascertain damages for railroad crossings as well as other condemnations of land; but it confessed that the ¹⁷⁰ law had not provided the method of ascertaining the points and manner of crossing, and therefore fell back upon the language of the act which gave to every railroad company the right to cross any other railroad "at any point on its route," and interpreted it to mean that the petitioner could fix its own point of crossing, referring at the same time to a former law which authorized commissioners to fix points and manner of crossing. The difference between the two statutes is so obvious that comment is unnecessary: *Lake Shore etc. Ry. Co. v. Cincinnati etc. Ry. Co.*, 116 Ind. 578, was a discussion of a statute exactly like our General Statutes, section 1571, except that in case of disagreement the points and manner of crossing were to be fixed in the first place by commissioners, as was the amount of compensation. On a question as to the sufficiency of allegations showing an inability to agree, one side arguing that the necessity for showing disagreement only went to compensation, the court said:

"We cannot see how it is possible, looking solely to the words of the statute, to hold that all that it refers to is the matter of compensation, since to reach such a conclusion many strong and clear words must be rejected. The language is plain, but plain as it is, we think it not more plain than the object the legislature intended to accomplish. It is very evident that the legislature did not mean to invest the younger company with power to cross at any point and in any mode it might elect; but that, on the contrary, it meant to prevent the arbitrary exercise of the right to cross the older line. . . . Our conclusion is that the negotiations which the statute requires the two corporations to conduct, are negotiations concerning the three things we have enumerated—compensation, and points and manner of crossing—and that if

these three things cannot be settled by negotiation they must be brought before the appropriate tribunal for adjudication."

Cases upon statutes similar to ours and that of Indiana are found in *St. Louis etc. Ry. Co. v. St. Louis etc. Ry. Co.*, 100 Mo. 419; *Montana etc. Ry. Co. v. Helena etc. R. R. Co.*, 6 Mont. 416; *Toledo etc. R. R. Co. v. East Saginaw etc. R. R. Co.*, 72 Mich. 206; *Union Pacific Ry. Co. v. Leavenworth etc. Ry. Co.*, 29 Fed. Rep. 728; *In re Lockport etc. R. R. Co.*, 77 N. Y. 557; *In re Minneapolis etc. Ry. Co.*, 36 Minn. 481; and *In re St. Paul etc. Ry. Co.*, 37 Minn. 164, in all of which the matter of the points and manner of crossing are treated as, or held to be, matters of judicial determination, and not of arbitrary exercise by the petitioning corporation.

In the case cited above from 6 Bissell, the United States circuit court of the northern district of Illinois held that although the general policy of the legislation of that state was to allow a new railroad to cross an existing road at grade, equity would interfere to compel it to cross overhead, at a different place, although at some cost, where the crossing proposed would materially interfere with the business of the senior road. Judging this case by our own statute, and by these authorities, we do not think the respondent made out a case of necessity that it should cross appellants' tracks at the point and in the manner proposed, except as to the crossing beneath the coal-bunkers of the Columbia and Puget Sound Company.

One of the items in which it failed has not yet been mentioned, viz., its proposed crossing with four tracks. It showed no definite intentions as to the use of so many tracks, but suggested that it would probably use the easterly two tracks for the passage of its freight and passenger trains, the third track for the passing and repassing of locomotives, and the fourth track for connections with wharf spurs. All of these tracks it calls "main tracks," but they are obviously so in name only. The main line consists of but a single track, and the three additional tracks are for mere connections between the shops and the freight yard. Conceding, however, that a necessity was shown for two tracks for the purposes of such connection through the city, it was not suggested why these two tracks could not perform the entire service required or likely to be required. Ordinarily, under the statute, a railroad company is permitted to condemn land to a certain width, and may maintain thereon as many tracks as it sees fit, but in such a case as this, which the principal of respon-

dent's witnesses likens to the case of a cañon or defile, the right of way allowed to be taken should be limited to what is necessary, and no more. With two tracks—an inward and an outward—it would have facilities far better than those of either of the appellants, and equal to those of nine railroads in ten in the country. Being located practically upon the streets of a city, where the whole room applicable to railroad purposes is shown to be extremely limited, it should not expect more, and certainly the public interest would not be subserved by conceding more, for the purposes set forth.

6. Appellants claim that there was no attempt on the part of respondent to agree with them as to the points and manner of crossing, and the record sustains them. In cases of crossings like this one, courts will not be technical in requiring an effort to agree, but the theory adopted by respondent, and its letter to the appellants, shows that it purposely limited its proposition to one of compensation for the specific crossing described, and none other. The importance of showing an attempt to agree upon the three cardinal points appears from the cases we have cited elsewhere.

7. We do not think there was error on the part of the judge who heard the case on the question of necessity in sending the jury trial to another judge, for the case consisted of two distinct branches. If a judge should die, or retire from the bench after ordering a jury, there could ¹⁷³ certainly be no necessity for going over the preliminary part of the case again; but, on a motion for a new trial before the second judge, we think the whole case would be open for re-examination, and the better practice would be for the same judge to hear the entire matter.

8. The proposition of respondent to stipulate that it would put in and maintain at its own expense all necessary frogs and crossing apparatus was proper, and is sustained by authority: *Chicago etc. R. R. Co. v. Joliet etc. Ry. Co.*, 105 Ill. 388; 44 Am. Rep. 799. So, also, we think, would be the proposition to construct and maintain the overhead arrangement for the crossing under the bunkers, the manner of construction being left to the court in case the parties could not agree.

Other questions in the case appealed have either been covered or are immaterial to a decision. The decree of appropriation will be reversed, and the petition dismissed.

DUNBAR, C. J., and ANDERS and SCOTT, JJ., concur.

HOYT, J., dissents.

EMINENT DOMAIN—RAILROADS—RIGHT OF ONE RAILROAD TO CONDEMN CROSSING OVER RIGHT OF WAY OF ANOTHER.—This subject and the various questions incidental thereto will be found thoroughly discussed in the following cases: *National Docks etc. Ry. Co. v. State etc. Canal Co.*, 53 N. J. Eq. 217; 26 Am. St. Rep. 421, and note; *Toledo etc. Ry. Co. v. Detroit etc. R. R. Co.*, 62 Mich. 364; 4 Am. St. Rep. 875; *Appeal of Sharon Ry. Co.*, 122 Pa. St. 533; 9 Am. St. Rep. 133, and extended note; *Appeal of Pittsburgh etc. R. R. Co.*, 122 Pa. St. 511; 9 Am. St. Rep. 128.

EMINENT DOMAIN.—MARSH LANDS SUBJECT TO: Note to *Tidewater Co. v. Coster*, 90 Am. Dec. 646.

FIRST NATIONAL BANK OF ABERDEEN V. ANDREWS.

[7 WASHINGTON, 261.]

NATIONAL BANKS HAVE AUTHORITY TO TAKE ASSIGNMENTS OF NOTES AND MORTGAGES upon real estate to secure payment of loans made to the mortgagees.

MORTGAGE TO SECURE DIFFERENT NOTES—PRIORITIES.—An assignment to different persons of notes secured by the same mortgage, but made payable at different dates, either with or without an accompanying assignment of the mortgage, does not entitle the holder of the note first coming due to any prior right to the proceeds of a foreclosure sale of the mortgaged premises. On the contrary, all the assignees are entitled to share *pro rata* in the proceeds of the mortgaged premises.

N. W. Bush, for the appellants.

McKinlay, Linn, and Bridges, for the respondent.

261 **DUNBAR, C. J.** On December 31, 1891, Andrews made his two promissory notes payable to E. C. Finch, numbered 1 and 2. No. 1 was payable six months from date, and No. 2 was payable nine months from date. At the time of the execution of the notes, Andrews made and delivered to Finch a mortgage on real estate, to secure the payment of both of said notes. On said day Finch sold note No. 1 to the First National Bank of Aberdeen, and guaranteed the payment thereof. No assignment of any part of the mortgage was made to the bank, nor was the mortgage delivered to it. The mortgage was recorded by Finch on March 28, 1892, in the proper office of record. On April 9, 1892, Finch sold note No. 2 to Alexander Young, and indorsed it without recourse on him, but at the same time he made and delivered a written assignment to so much of said mortgage as secured the payment of note 262 No. 2, and also delivered to Young the mortgage itself. An action was brought by the bank, to which Young was made a party. Young afterwards brought an action to foreclose, and these actions were consolidated by the court,

and upon which trial the court decided that the note of the bank was entitled to a priority of the proceeds arising from the sale of the mortgaged premises.

There are two questions of law involved in this case: 1. The question of authority on the part of the national bank to take a mortgage on real estate to secure payment of a loan where a debt had not been previously contracted; 2. The question of priority, where the holder of two promissory notes, coming due at different times, secured by mortgage, parts with their ownership to different persons at different times; and the sum realized from the sale of the mortgaged premises proves insufficient to pay the notes in full.

The first question involves the determination of the scope and extent of the prohibition imposed upon national banks by sections 5136 and 5137 of the Revised Statutes of the United States, which provides, in substance, that a national bank may loan money on personal security, and that it may purchase, hold, and convey real estate for the following purposes, and no other:

"1. Such as shall be necessary for its immediate accommodation in the transaction of its business; 2. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted; 3. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; and, 4. Such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it."

Upon the construction of this statute the courts of the different states are divided; but the supreme court of the United States has uniformly held that a distinction can be ²⁶³ made between borrowing money on real estate and accepting an assignment of a mortgage by the mortgagee as security for money borrowed by the said mortgagee. This doctrine was first announced in *National Bank v. Matthews*, 98 U. S. 621. In that case A executed a promissory note to B, and secured in payment thereof a deed of trust of lands, which was in fact a mortgage with a power of sale annexed. The bank, on security of the note and deed, loaned money to B, who thereupon assigned them to the bank. It was held that the bank was entitled to enforce the collection of the note by sale of the lands. This decision was afterwards indorsed, and the doctrine reaffirmed in *National Bank v. Whitney*, 103 U. S. 99; *Reynolds v. Crawfordville First Nat. Bank*, 112 U. S. 405; and

in *Fortier v. New Orleans Nat. Bank*, 112 U.S. 439. Whether, if the statute were before us for primary construction, we would conclude that the distinction made by the supreme court of the United States was logical, there might be some question; but as it is a construction of the United States statute, and the United States supreme court has decided in *Swope v. Leffingwell*, 105 U. S. 3, that it has authority to re-examine the judgment of a state court where this question is involved, we feel bound to follow the decisions of that tribunal.

On the question of priority of the assignees, an investigation of the authorities in this opinion would be profitless, for the rules announced by the courts are absolutely at variance, and cannot be reconciled. There are, however, two general rules promulgated by the courts. The one established in a large number of states is, that where the notes are made payable at different dates and are assigned by the mortgagee, either with or without an accompanying assignment of the mortgage, the holder of the first note coming due has a prior right to the proceeds of the mortgaged ²⁶⁴ premises. In other words, that the right of priority among the respective assignees was tested by the maturity of the respective notes. While a vast number of cases of equally respectable authority hold that, under the circumstances mentioned above, there is no preference given to the first note maturing, and that in the absence of expressed stipulation there is no priority in the case at all, and that all the assignees are entitled to share *pro rata* in the proceeds of the mortgaged premises. Although the former rule is favored by such eminent authority as Mr. Pomeroy in his *Equity Jurisprudence*, section 1201, the latter rule appeals to our judgment as being more equitable. The mortgage, in the first place, was executed for the equal benefit of all the notes. The security was intended as much for the last note coming due as for the first one. There seems to be no real reason why the relative positions of the notes and mortgage should be changed because the ownership of the notes has changed. The value of the notes frequently depends upon the security. We think the more equitable and consistent rule is to leave their values undisturbed by their assignment.

Miller v. Washington Savings Bank, decided by this court, and reported in 5 Wash. 200, is cited by the respondent in favor of his contention; but an examination of this case shows that the court did not attempt to announce any general rule

on the question involved in this case. That decision, in fact, goes further against the position of respondent in this case than we find it necessary to go, as it was there decided that the priority was in favor of the note last maturing. However, no rule was established, as it was decided squarely upon the particular circumstances of the case.

With this view of the law, the judgment will be reversed, and the cause remanded, with instructions to ascertain the amounts due on the respective notes, and order a *pro rata* application thereon of the proceeds of the mortgaged premises.

ANDERS, HOYT, SCOTT, and STILES, JJ., concur.

MORTGAGE SECURING SEVERAL NOTES—PRIORITY.—When a mortgage is made to secure several notes which mature at different times, and are assigned to different persons, and the proceeds of the mortgaged property are not sufficient to pay all the notes, such proceeds must be distributed among the different holders *pro rata*, irrespective of the dates of the assignments or the maturity of the different notes: *Penzel v. Brookmire*, 51 Ark. 105; 14 Am. St. Rep. 23, and note, with the cases collected; *Whithead v. Morrill*, 108 N. C. 65; but in *Schultz v. Plankinton Bank*, 141 Ill. 116; 33 Am. St. Rep. 290, it was held that when a mortgage is given to secure several notes maturing at different dates, the notes are entitled to priority of payment from the proceeds of the property embraced in the mortgage in the order in which they respectively become due.

NATIONAL BANKS—TAKING MORTGAGE TO SECURE LOAN.—A national bank has a right to take a chattel mortgage for the purpose of securing a previously contracted debt, and to enforce the same: *Spofford v. First Nat. Bank*, 37 Iowa, 181; 18 Am. Rep. 6; but a national bank has no power to take a deed of trust or mortgage on real estate to secure a contemporaneous loan: *Matthews v. Skinker*, 62 Mo. 329; 21 Am. Rep. 425; *Fowler v. Scully*, 72 Pa. St. 456; 13 Am. Rep. 699.

STATE v. DUNCAN.

[7 WASHINGTON, 336.]

CRIMINAL LAW—CONTINUANCE—RIGHT OF ACCUSED TO BE PRESENT.—The granting of a continuance in a criminal case in the absence of the accused is not error if his counsel is present, and it does not appear that the accused was subjected to any injustice.

CRIMINAL LAW—CROSS-EXAMINATION OF ACCUSED.—A person accused of crime testifying in his own behalf for the sole purpose of establishing his innocence, although he is not directly questioned as to his guilt, may be cross-examined relative to his flight soon after the crime was committed for the purpose of evading prosecution. Such cross-examination is proper as affecting the credibility of the accused as a witness.

CRIMINAL LAW—CROSS-EXAMINATION OF ACCUSED.—A person accused of crime testifying in his own behalf is subject to be contradicted, disputed, or impeached the same as any other witness. Cross-examination for this purpose is not in violation of a constitutional provision that no person accused of crime shall be compelled to give evidence against himself.

CRIMINAL LAW—PRINCIPAL AND ACCESSORY.—Under a statute abrogating the distinction between principal and accessory before the fact, a person may be found guilty under an indictment charging him as principal, although the evidence shows him to have been an accessory before the fact.

LARCENY—POSSESSION OF STOLEN PROPERTY AS EVIDENCE OF GUILT.—The late possession of stolen property alone is not sufficient to sustain a verdict of guilt of larceny, but it is a circumstance tending to show guilt. An instruction embodying this proposition is not open to the objection that it charges upon matters of fact.

Hyde, Glass, and Reagan, for the appellant.

James E. Fenton, prosecuting attorney, and James A. Haight, for the state.

327 Scott, J. The defendant, Arthur Duncan, was convicted of the crime of larceny, and he appealed to this court, alleging as error the granting of a continuance of the cause from the 18th to the 24th of March without his personal presence. It is claimed that this is a violation of section 22, article 1, of the constitution, which provides that "in criminal prosecutions the accused shall have a right to appear and defend in person and by counsel." We are of the opinion, however, that this provision has reference to matters connected with the trial, and not to any thing preliminary thereto, and the granting of a continuance is not a part of the trial, but is a preliminary matter. Counsel for the prisoner was present at the time said order was granted, and objected, but not on the ground that the defendant was absent. It does not appear that the defendant 328 was subjected to any injustice or injury in the premises.

Upon the trial of the cause the defendant took the stand, and testified in his own behalf. Upon his cross-examination the prosecuting attorney was permitted to ask him questions relative to his having fled soon after the crime was committed for the purpose of evading the prosecution. It is contended that this was erroneous upon two grounds: 1. Because not proper cross-examination; 2. Because it was a violation of section 9, article 1, of the constitution of the state, which provides that "no person shall be compelled in any criminal case to give evidence against himself."

As to the first ground, it is contended that it was improper cross-examination, because in the direct examination of the defendant he was only questioned touching his movements on the night prior to his arrest and on the morning of his arrest, while the questions relating to his flight from the state and absence from the trial of his brother, who was indicted with him, related to matters happening subsequent thereto. In his direct examination the defendant had been questioned generally with regard to his connection with the crime charged, and testified in relation to it. He was not asked the direct question as to whether or not he was guilty, nor did he in specific words deny his guilt, but the whole purpose of his testimony was to show that he was not guilty, and we are of the opinion that the questions complained of were proper as tending to affect the credibility of the witness, the fact of flight was some evidence of guilt, and as such, tended to show that the defendant had testified untruthfully in endeavoring to show that he was not guilty. It had a direct bearing upon the truthfulness of his testimony in chief.

It is contended that the jury would not stop with considering the fact of flight as affecting the credibility of the defendant only, but would consider it as evidence of his ³³⁰ being guilty of the crime charged. It is doubtful whether a dividing line can be drawn under the facts of this case, for the only way it could affect his credibility was in showing that he was guilty of the offense charged, and that consequently the testimony he had given in his direct examination to the effect that he was not guilty was untrue. But be this as it may, no error can be founded in the premises, for the instructions given by the court to the jury that the fact of flight might be taken as evidence of guilt were given at the request of defendant. For instance, defendant requested the court to charge as follows:

"The jury may consider, as one of the circumstances in this case, the fact that defendant did not appear when his case was called for trial a few months after his arrest; but the fact that defendant fled is not conclusive proof of his guilt, and in the absence of other evidence is not sufficient to authorize a verdict of guilty. In considering the circumstance of flight, the jury should consider the reasons why defendant fled, his temperament, his surroundings, the advice of his friends, the urgings of his family, and all that influenced him to flee."

And the court gave this instruction with others relating thereto, requested by the defendant; consequently, if a distinction can be drawn between considering such evidence only as affecting the credibility of the defendant, and not as evidence of his guilt of the crime charged, the defendant is not in a position to take advantage of it in this case. Nor was such cross-examination a violation of the constitutional provision aforesaid. When a defendant in a criminal case takes the witness-stand, he assumes the character of a witness, and as such is subject to be contradicted, disputed, or impeached the same as any other witness: Code Proc., sec. 1307; *Boyle v. State*, 105 Ind. 469; 55 Am. Rep. 218; *Thomas v. State*, 103 Ind. 419; *State v. Pfefferle*, 36 Kan. 90.

It is further contended that the court erred in charging ²⁴⁰ the jury that the defendant might be convicted if, though not standing by at the time the taking was done, he advised and counseled it with the idea and with the intention of receiving the benefits of the property taken, on the ground that this was in effect telling the jury that the defendant might be found guilty under the information charging him as principal, if the evidence showed him to have been an accessory before the fact. Section 1189, Code Procedure, provides that "No distinction shall exist between an accessory before the fact and a principal, or between principals in the first and second degree, and all persons concerned in the commission of an offense, whether they directly counsel the act constituting the offense, or counsel, aid, and abet in its commission, though not present, shall hereafter be indicted, tried, and punished as principals."

Under a statute substantially like this the supreme court of California has held that the distinction between an accessory before the fact and a principal is abrogated, and that an accessory before the fact must be prosecuted, tried, and punished as principal, and that it is sufficient to charge such accessory directly as principal: *People v. Outeveras*, 48 Cal. 19; *People v. Rozelle*, 78 Cal. 84.

It is contended that charging the defendant as principal does not sufficiently put him upon his guard and advise him of the facts to be proven against him, where it is sought to show that he was an accessory before the fact but not a direct participant in the crime itself, and that consequently an innocent man might be surprised in a trial by the proof offered, and not have sufficient opportunity to prepare therefor in

consequence of his not having known in advance the facts to be shown against him. But we doubt if there is any more foundation for this contention than there would be where the effort was to show the defendant a principal in the commission of the crime charged. For instance, in the crime charged here, that of larceny of ^{§41} a steer belonging to one Neal Smythe, it was possible for the offense to have been committed in so many different ways and under such a variety of circumstances as principal, even, that in the case of an innocent man, the formal charge itself might not afford any accurate information of the facts and circumstances to be shown; but in such a case, where a party is prosecuted as principal, it is not contended that there need be any thing more than a formal charge.

It is not necessary to set up the evidence to be offered, nor the particular facts to be established. For instance, as to the particular part of the county where the property was stolen, whether taken in the night or in the daytime, how taken, or how converted to the use of the defendant, the kind of property other than as one steer, etc., as to all of which the evidence might widely vary in different cases and yet be legitimate evidence under an information couched in practically the same words charging the defendant as principal. And until it is made necessary by law, in the case of a prosecution for a crime, to set up the particular acts to be proven against a principal, it is not necessary to set the same forth in the case of an accessory before the fact.

The defendant requested the court to give the following instruction: "The jury are instructed that the bare possession of stolen property alone is not sufficient to sustain a verdict of guilty," which the court gave, but added the following: "It is only a circumstance tending to show guilt." It is contended that this is error, as being a violation of section 16, article 4, of the constitution, which provides that "judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." It is not claimed, however, that it is not a correct statement of the proposition, and it is a sufficient answer to say that as the defendant requested an instruction upon this point he cannot complain upon the ground stated, because ^{§42} the court gave a more complete statement than he had requested.

Judgment affirmed.

DUNBAR, C. J., and HOYT, J., concur.

ANDERS, J., concurring. I think the cross-examination of the defendant in this case was not carried beyond the legitimate bounds. Whenever a defendant becomes a witness to disprove a criminal charge, he thereby subjects himself to the same liabilities in cross-examination as does any other witness, and may be cross-examined as to any pertinent matters, even although such testimony may tend to criminate him. The statute authorizing parties charged with offenses to testify in their own behalf was never intended to enable them to testify as to facts tending to disprove guilt, and, at the same time, to suppress other facts tending to shake their credibility, or to throw additional light upon, or give color to, facts, and circumstances detailed in the examination in chief. The object of all testimony is to elicit the truth; and experience has shown that it is only by cross-examination that the whole truth can be discovered. No one can be compelled to give evidence against himself, nor can any one accused of crime be compelled to testify in his own behalf, and, if he does not see fit to do so, it is the duty of the court to charge the jury that no presumption of guilt arises therefrom. But when a person charged with the commission of an offense voluntarily assumes the character of a witness, he waives his constitutional protection to the extent, at least, of being cross-examined according to the rules of evidence. And if he states facts tending to prove his innocence, it seems to me that it would be contrary to every consideration of justice to permit him to refuse to state other facts connected with the offense which might tend to show the falsity of his testimony in chief. No one would contend ²⁴³ that he could not be compelled to answer whether he had not made declarations out of court contrary to his testimony on the witness-stand, and I am unable to understand, upon principle or reason, why he should be permitted to refuse to state whether he had not acted contrary to his declarations as a witness.

The objection that the court's modification of the instruction requested by the defendant was in contravention of section 16, article 4, of the state constitution, is without foundation, for the reason that all that was added thereto was plainly implied in the instruction as originally presented to the court. I see no error in the record, and think the judgment ought to be affirmed.

STILES, J., dissented on the ground that when a person accused of crime has testified to the legal conclusion that he is not guilty, without any direct examination concerning the fact of his flight soon after the crime was committed, it is not proper cross-examination to question him relative to such flight to avoid prosecution, for the reason that this is an independent examination into a matter wholly foreign to the direct examination, and as flight is a circumstance tending to show a consciousness of guilt, it negatives the legal conclusion of innocence, and although the circumstance of flight tends to contradict the testimony of the accused, it does not affect his credibility as a witness. Its only effect is to compel the prisoner to give evidence against himself in direct violation of the constitutional guaranty that no person shall be compelled in any criminal case to give evidence against himself. Justice Stiles cited *People v. Yeaton*, 75 Cal. 415, as an instance where precisely the same attempt was made to cross-examine an accused under the guise of impeachment of the witness, and the judgment in that case was reversed on appeal by a unanimous court for error committed in compelling the witness to answer. The dissenting justice also stated, in support of his views, the well-established rule that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination, and if he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him as such: *Philadelphia etc. R. R. Co. v. Stimpson*, 14 Pet. 461; 1 Greenleaf on Evidence, sec. 445; 1 Wharton on Evidence, sec. 529; 1 Rice on Evidence, 586; Rapalje on Law of Witnesses, sec. 246. He also stated that the correct rule was laid down in *Boyle v. State*, 105 Ind. 469, 55 Am. Rep. 218, where it was said that "The cross-examination of a witness must be confined to the subject opened by direct examination. This settled rule does not, however, restrict the cross-examination to the specific facts developed by the direct examination, but does confine it to the subject of that examination. Where a subject is opened by the direct examination, the cross-examining counsel may go fully into the details of the subject, and is not confined to the particular part of it embraced within the questions asked upon the direct examination."

ACCESSORIES AND ACCOMPLICES—WHO ARE PRINCIPALS.—All persons who are present at a wrongful act and participate therein by counsel, advice, or otherwise, are regarded as principals and held liable as such; this rule prevails in criminal cases: *Willi v. Lucas*, 110 Mo. 219; 33 Am. St. Rep. 436, and note; *White v. People*, 139 Ill. 143; 32 Am. St. Rep. 196, and note; *State v. Whitson*, 111 N. C. 695; *Commonwealth v. Hollister*, 157 Pa. St. 13. Where two persons are jointly indicted for a crime, one as principal and the other as aider, the one charged as aider may be found guilty as principal, each being criminally liable for the act of the other: *Benge v. Commonwealth*, 92 Ky. 1. All distinctions between principals in the first and second degree and accessories before the fact have been abolished in Missouri: *State v. Johnson*, 111 Mo. 578.

LARCENY.—POSSESSION OF STOLEN PROPERTY very soon after the larceny raises a presumption of guilt which, if not rebutted, will warrant a conviction of the larceny: *Huggins v. People*, 135 Ill. 243; 25 Am. St. Rep. 357, and note; *Robb v. State*, 35 Neb. 285; *Blaker v. State*, 130 Ind. 203; *Blankenship v. State*, 55 Ark. 244; *Williamson v. State*, 30 Tex. App. 330; *Clark v. State*, 30 Tex. App. 402; *Shepperd v. State*, 94 Ala. 102. See, also, *State v. Taylor*, 111 Mo. 538.

Cross-Examination of Defendant in Criminal Prosecutions.*

ACCUSED AS WITNESS—CROSS-EXAMINATION OF.—In general, a person accused of crime by voluntarily taking the witness-stand in his own behalf changes his *status* from defendant to witness, and consequently may be treated like any other witness. In other words a defendant in a criminal case taking the witness-stand to testify in his own behalf, assumes the character of a witness, and is entitled to the same privileges, and subject to the same tests, and to be contradicted, discredited, or impeached in like manner as any other witness: *Keyes v. State*, 122 Ind. 527; *Brandon v. People*, 42 N. Y. 265; *State v. Witham*, 72 Me. 531; *State v. Red*, 53 Iowa, 69; *Disque v. State*, 49 N. J. L. 249; *State v. Pfeifferle*, 36 Kan. 90; *Thomas v. State*, 103 Ind. 419; *State v. Beaty*, 25 Mo. App. 214; *State v. Abrams*, 11 Or. 169; *People v. Reinhart*, 39 Cal. 449. In Missouri the narrow rule prevails, that a defendant in a criminal case, testifying in his own behalf, can be cross-examined only as to matters directly referred to by him in his examination in chief: *State v. McLaughlin*, 76 Mo. 320; *State v. Porter*, 75 Mo. 171; *State v. Chamberlain*, 89 Mo. 129. Cases exist in other jurisdictions which support this doctrine: *State v. Saunders*, 14 Or. 300; *People v. O'Brien*, 66 Cal. 602, but in the subsequent case of *People v. Rozelle*, 78 Cal. 84, it was held that the cross-examination of a defendant in a criminal case as to matters about which he is examined in chief, is not confined within narrower limits than in the case of any other witness, except that the court may not have such discretion as to the extent and scope of the cross-examination as in the case of other witnesses. Consequently if the defendant on his direct examination denies the commission of the crime charged, he may be cross-examined as to whether a letter, which tends to contradict such denial and to show a perpetration of the crime, is in his handwriting. The action of a trial court in permitting a defendant testifying in his own behalf to be cross-examined on matters not referred to in his direct examination, is not reviewable on appeal unless objections were made, and exceptions reserved at the time: *State v. Turner*, 110 Mo. 196.

When an accused becomes a witness in his own behalf, and denies that he committed the crime for which he is on trial, a wide latitude of cross-examination is permissible, owing to the general nature of defendant's statement: *People v. Mullings*, 83 Cal. 138; 17 Am. St. Rep. 223. Upon the cross-examination of such witness, such deflections from the matter brought out on direct examination are allowed as may be necessary to bring the whole matter trenched upon by the direct examination before the court, and to extract the whole truth concerning the matter brought forward by the accused. Successful efforts of this nature must necessarily operate materially against him, but having voluntarily placed himself on the witness-stand, he must abide the consequences. It has been decided, that when a defendant in a criminal case becomes a witness in his own behalf, it is in the discretion of the court to allow him to be cross-examined on the whole case, and the exercise of such discretion is not reviewable as error on appeal: *Disque v. State*, 49 N. J. L. 249. If, on his direct examination, he undertakes to state all that occurred between two points of time, he may be asked, on his cross-examination, if he has omitted any thing pertinent to the case, and his attention may be directed to the precise point by asking him if some specified

* REFERENCE TO MONOGRAPHIC NOTES.

Cross-examination of defendant in criminal prosecutions: 19 Am. Rep. 343, 349; 27 Am. Rep. 140-145.

thing did not occur: *People v. Russell*, 46 Cal. 121. If, on his cross-examination, he has voluntarily made statements concerning matters not embraced in his direct examination, he may be cross-examined for the purpose of making such statements more clear: *People v. Sutton*, 73 Cal. 243. In the discretion of the court he may be cross-examined and afterwards recalled for further cross-examination: *State v. Cohn*, 9 Nev. 179. He may be recalled by the state and cross-examined for the purpose of laying the foundation for impeaching his testimony, if such cross-examination relates to the testimony he has given in his own behalf: *State v. Horne*, 9 Kan. 119. A person on trial for violating an election law by writing names improperly on a registration book, who testifies in his own behalf that he did not so write the names, may be compelled, on cross-examination, to write the same names on paper, in the presence of the jury, for the purpose of comparing the names when thus written with the writing in the registration book: *United States v. Mullaney*, 32 Fed. Rep. 370.

A defendant on trial for murder, who testifies in his own behalf, and gives a detailed account of his feeling on the day of the homicide, for the purpose of showing an absence of malice, may be asked on cross-examination if he did not on that day state that he had the same right to kill a man trying to steal his land as one trying to steal his horse. Such evidence is competent as showing his malice: *State v. West*, 95 Mo. 139. A person accused of murder, who, on the witness-stand, admits the homicide, and claims that he committed it on account of insults offered by the deceased to his wife, is properly asked on cross-examination if she is his lawful wife: *Watson v. Commonwealth*, 87 Va. 608. A defendant in a bastardy proceeding having testified in defense, denying having had intercourse at the time stated in the complaint and sustained by the evidence, may be required on cross-examination to answer whether he had such intercourse at another time: *State v. Klitzke*, 46 Minn. 343. The extent to which an accused may be cross-examined on matters irrelevant and collateral to the main issue, with a view of impairing his credibility, depends upon the appearance and conduct of the witness and all the circumstances of the case, and necessarily rests in the sound discretion of the trial court; and it is only where there has been a clear abuse of that discretion that error is committed: *State v. Pfeifferle*, 36 Kan. 90; *Hanoff v. State*, 37 Ohio St. 179; 41 Am. Rep. 496. Under the rule that a defendant who voluntarily becomes a witness in his own behalf is subject to the same rules and tests as any other witness, he may be required to answer on cross-examination whether he has not been charged with, or convicted of, a similar crime at some previous time to that alleged in the indictment under which he is on trial.

Questions of this nature are allowed with a view of testing the credibility of the witness: *State v. Probasco*, 46 Kan. 310; *State v. Pfeifferle*, 36 Kan. 90; *Hanoff v. State*, 37 Ohio St. 178; 41 Am. Rep. 496; *State v. Ellwood*, 17 R. I. 763; *State v. Bacon*, 13 Or. 143; 57 Am. Rep. 8; *Commonwealth v. Sullivan*, 150 Mass. 315; *People v. Johnson*, 57 Cal. 571; *People v. Irving*, 95 N. Y. 541. The only exception to this rule is that existing under a peculiar statute in Missouri, under which it is held that it is error to compel an accused on cross-examination to answer the question whether he has been previously convicted of a felony or other crime: *State v. Brent*, 100 Mo. 531.

There is a conflict in the authorities as to whether a person accused of one crime can be, after offering himself as a witness, cross-examined as to his former indictment for, or conviction of, a crime of a different nature for the purpose of testing his credibility. A majority of the cases hold that such

cross-examination must be confined to questions regarding his former conviction of, or indictment for, a crime similar in nature to that for which he is on trial. Thus it is held that a defendant in a criminal case, who avails himself of the statutory privilege of testifying in his own behalf, cannot be cross-examined against his objection as to former indictments against him for other and different offenses not pertinent to the issue to be tried: *Smith v. State*, 79 Ala. 21; *State v. Huff*, 11 Nev. 17; *People v. Crapo*, 76 N. Y. 288; 32 Am. Rep. 302; *People v. Brown*, 72 N. Y. 571; 28 Am. Rep. 183; *People v. Noelke*, 94 N. Y. 137; 46 Am. Rep. 128; *People v. Irving*, 95 N. Y. 541. Other cases hold that the accused may be compelled to state on cross-examination whether he has been arrested for, or convicted of, another and different crime, at a previous time, with a view to affect his standing as a witness: *People v. Foote*, 93 Mich. 38; *State v. Lawhorn*, 88 N. C. 634; *King v. State*, 91 Tenn. 617. Questions as to specific acts or facts which tend to discredit the accused, or to impeach his moral character, may be asked him on cross-examination: *People v. Irving*, 95 N. Y. 541; *State v. Huff*, 11 Nev. 17; *Keyes v. State*, 122 Ind. 527. But to entitle the prosecution to cross-examine him about matters which are irrelevant to the main issue, and calculated to prejudice him with the jury, they must at least be such as clearly go to impeach his general moral character and his credibility as a witness: *People v. Crapo*, 76 N. Y. 288; 32 Am. Rep. 302; *State v. Bacon*, 13 Or. 143; 57 Am. Rep. 8; and a sound discretion will never sanction inquiries the sole object of which is to disgrace the witness, and not to test his credibility: *State v. Bacon*, 13 Or. 143; 57 Am. Rep. 8; *People v. Brown*, 72 N. Y. 571; 28 Am. Rep. 183.

It is well settled that when an accused becomes a witness in his own behalf, he cannot be compelled on cross-examination to disclose confidential communications between himself and his attorney, nor can such disclosures be required of the attorney without the consent of the accused: *Duttenhofer v. State*, 34 Ohio St. 91; 32 Am. Rep. 362; *Swenk v. People*, 20 Ill. App. 111; *State v. White*, 19 Kan. 445; 27 Am. Rep. 137; but if the accused on direct examination goes into the matter of consultations or communications with his counsel, he may be compelled to answer fully on cross-examinations: *Swenk v. People*, 20 Ill. App. 111.

PRIVILEGE—SELF-INCRIMINATION.—If a person charged with crime voluntarily offers himself as a witness in his own behalf to disprove the criminal charge he thereby waives his constitutional privilege of refusing to answer questions on cross-examination because his answers may tend to criminate himself. So far as concerns questions touching the merits, the defendant, by making himself a witness as to the offense, waives his privilege as to all matters connected with the crime, and may be cross-examined as to every thing relevant to the issue: *State v. Thomas*, 98 N. C. 599; 2 Am. St. Rep. 351; *State v. Allen*, 107 N. C. 805; *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320; *Commonwealth v. Lannan*, 13 Allen, 563; *Commonwealth v. Mullen*, 97 Mass. 545; *Commonwealth v. Morgan*, 107 Mass. 199; *Commonwealth v. Nichols*, 114 Mass. 285; 19 Am. Rep. 346; *Peck v. State*, 86 Tenn. 259; *Ranis v. State*, 88 Ala. 91; *Keyes v. State*, 122 Ind. 527; *State v. Ober*, 52 N. H. 459; 13 Am. Rep. 88; *Commonwealth v. Tolliver*, 119 Mass. 312; *State v. Fay*, 43 Iowa, 651; *State v. Wentworth*, 65 Me. 234; 20 Am. Rep. 688; *Connors v. People*, 50 N. Y. 240. The privilege a witness has, of declining to answer a question that might subject him to a criminal prosecution is a privilege of the witness, and not of the party. When he is both party and witness, he must be held on his cross-examination as waiving the privilege

as to any matter about which he has given testimony in chief. Having testified to a part of the transaction in which he was concerned, he is bound to state the whole: *Roddy v. Finnegan*, 43 Md. 490. While the accused need not take the witness-stand to criminate himself, yet if he voluntarily testifies to any incriminatory matter, he may be compelled on cross-examination to testify in respect to that matter concerning all that is material to the issue: *State v. Fay*, 43 Iowa, 651. Thus, a defendant, who testifies in his own behalf on a prosecution for murder, may be asked and compelled to answer on cross-examination, "where he was each day and night from the night of the killing until he was arrested" a short time afterwards: *Ranis v. State*, 88 Ala. 91-98. In this case the court said: "He voluntarily made himself a witness in his own behalf, and, in doing so, submitted himself to cross-examination, to attack on his general character for veracity, and to every other mode of attack on his credibility, to the same extent as if he had been a disinterested witness. As to any fact or circumstance relevant to the issue, or which sheds light on the commission and character of the offense, though inculpatory, he waives his constitutional right to protection against being compelled to give evidence against himself. But the waiver extends no further than to all such facts and circumstances as may tend to illustrate the particular offense charged. Within these limits the fullest cross-examination should be allowed; but its range into inquiries respecting past transactions and offenses separate and distinct is prohibited by the constitutional inhibition." In *State v. Ober*, 52 N. H. 459, 13 Am. Rep. 88, the court said: "The questions here presented—whether a prisoner, who is sworn as a witness at his own request, can be compelled to answer questions upon his cross-examination as to facts tending to convict him, in relation to which he was not interrogated on his direct examination, and whether, upon being permitted to refuse to answer such questions upon the ground that his answers might tend to criminate him, such refusals may be commented upon by the state's counsel, and be considered by the jury. If the ruling that the prisoner had the right to decline answering had been correct we should agree with counsel that the subsequent ruling could not be sustained. But the first ruling was not correct. The respondent, by electing to testify in his own favor, waived his constitutional right and privilege. If he refuses to testify at all the statute protects him from adverse comment or inference, but if he avails himself of the statute he waives the constitutional protection in his favor, and subjects himself to the peril of being examined as to any and every matter pertinent to the issue." The accused, by becoming a witness in his own behalf, places himself in the position of any other witness in respect to the right of cross-examination, and he may be required to answer questions affecting his credibility as to matters relative to the issue, although having no relation to his testimony on the direct examination: *People v. Tice*, 131 N. Y. 651. In such case the jury should be instructed to consider impeaching testimony as affecting only his credibility as a witness, and not as impairing the presumption of his innocence: *Peck v. State*, 86 Tenn. 259.

QUINBY v. SLIPPER.

[7 WASHINGTON, 475.]

MECHANICS' LIENS—PARTIES—PLEADING.—In an action to enforce a mechanic's lien against the property of an insolvent owner, a complaint merely alleging that a third person, not described as assignee of the insolvent, has, or claims, some interest in the property, must be interpreted as directed against such assignee's interest in his personal capacity, and is not sufficient to make the insolvent estate a party to the action.

MECHANICS' LIEN—FORECLOSURE—INJUNCTION RESTRAINING SALE.—As a sale of property belonging to an insolvent estate, under a void judgment of foreclosure of a mechanic's lien, would constitute a cloud on the assignee's title, although he is not made a party to the suit, he may maintain an action to restrain such sale.

ASSIGNMENTS FOR BENEFIT OF CREDITORS, under the laws of Washington, vest the property in the assignee as an officer of the court, and prevent the enforcement of a mechanic's lien against the insolvent estate without leave of court, and all those having claims against such estate must present them in the insolvency proceeding.

Million and Houser, for the appellants.

Frank Quinby, for the respondent.

476 HOYT, J. Appellants furnished material for the erection of a building for one Hamilton, and, not being paid therefor, filed their lien under the statute, and brought their action against said Hamilton to foreclose the same. In their complaint in said action it was alleged that one F. W. Carlton had some interest in the premises against which the lien was sought to be enforced. A decree of foreclosure was had, whereupon this action was prosecuted by the respondent as assignee of the estate of said Hamilton to enjoin the appellants from enforcing said foreclosure judgment. Said Hamilton made an assignment before the commencement of the action for foreclosure of the lien, and said F. W. Carlton was, at the time the said action was commenced, the assignee by election of the creditors, and one of the questions presented is as to whether the allegation in the complaint in the foreclosure proceeding that said Carlton claimed some interest in the property was sufficient to make the estate of said Hamilton a party to the action. In our opinion it was not. Such allegation must be interpreted to have been directed against the said Carlton's interest in his personal capacity, and not as assignee of the said Hamilton.

The appellants claim that, this being so, the judgment was

absolutely void as against the estate, and for that reason the proceedings thereunder could in no manner affect the interests thereof. We cannot agree with this contention. The decree was in terms directed against a specific piece of property, and a sale thereunder would in some degree constitute a cloud upon the title, which would interfere with the assertion of the rights of the estate in regard thereto.

The only other question presented by the record is as to the right of the plaintiff as a lien claimant to maintain his ⁴⁷⁷ action for the foreclosure thereof, notwithstanding the fact that the person against whom the lien was to be enforced had, before the date of the commencement of the action, made an assignment under the statute as to insolvent debtors.

In our opinion such action could not be maintained. It is, perhaps, true that under a common-law assignment the estate taken by the assignee would be subject to the lien, and the person holding it could go into court and enforce his rights thereunder as though such assignment had not been made, by simply making the assignee a party to the proceeding in case he desired to foreclose him, as such assignee, from raising any question in regard thereto. But this court has frequently held that an assignment under our statute is entirely different. We have held that upon the execution of the deed of assignment the person executing it, to all intents and purposes, surrenders all his property, whether named in the deed of assignment or not, to the jurisdiction of the court, to be applied as directed by the statute. That the assignee named in said deed of assignment, or thereafter chosen, holds the property substantially as an officer of the court. This being so, it must follow that nothing can be done by any person in reference to said property, or looking to the enforcement of any lien against the same, without its leave first obtained. By such assignment the jurisdiction of the entire matter of adjusting claims against the estate, whether secured by lien or otherwise, passes to the court, and those having claims must present them in the insolvency proceeding. This is not only necessary, for the reason that the property is in the jurisdiction of the court, but it is in the interest of economy, and the proper adjustment of the affairs of the insolvent. Those having preferred claims can in no manner be injured by having thus to present them, for the reason that the court is clothed with ample power to protect the rights of such preferred creditors.

478 The foreclosure proceeding was, therefore, wrongfully commenced, and, as the enforcement of the judgment rendered would tend to embarrass a proper administration of the affairs of the insolvent, the lower court properly enjoined any enforcement thereof, and its action in so doing must be affirmed.

DUNBAR, C. J., STILES and SCOTT, JJ., concur.

ANDERS, J., not sitting. —

INJUNCTION TO PREVENT A SHERIFF'S SALE, which would throw a cloud on the complainant's title, will be granted where equity could set aside the deed if the sale were made: *Pettit v. Shepherd*, 5 Paige, 493; 28 Am. Dec. 437, and note. One has a right to have his title to land protected from a sale that might create a cloud upon it: *Guy v. Hermance*, 5 Cal. 73; 63 Am. Dec. 85, and note on injunctions to prevent cloud on title; note to *Carlin v. Hudson*, 62 Am. Dec. 523; *Ketchim v. McCarley*, 26 S. C. 1; 4 Am. St. Rep. 674, and note.

MULDOON v. SEATTLE CITY RAILWAY COMPANY.

[7 WASHINGTON, 523.]

CARRIERS—LIABILITY FOR NEGLIGENCE TO PASSENGER RIDING ON PASSES.—

A person accepting and riding upon a free railroad pass containing stipulations absolving the carrier from liability for negligence is bound by its terms, and cannot recover for personal injuries suffered by him through the negligence of a servant of the carrier.

· NEGLIGENCE—STANDING ON CAR PLATFORM.—It is not negligence *per se* for a passenger to stand upon the front platform of the trail car of a moving cable train, in the absence of any rule of the company against it and when it has been the custom for passengers to occupy that position. In cases of this nature the question of contributory negligence is generally for the jury.

A. F. Burleigh, for the appellant.

Thompson, Edsen, and Humphries, for the respondent.

529 STILES, J. In this case the bare legal question is up for determination, whether a person riding upon a public street-car, upon a free pass, can recover for personal injuries suffered by him through the negligence of the street railroad company's servant, when the pass had printed upon the back of it such a condition as the following:

"The person accepting this pass assumes all risks of accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether by negligence of

their agents or otherwise, for injury to the person, or for loss or injury to the property of the person, using this pass."

It is a general rule that carriers of passengers for hire cannot contract against their liability for damages for injuries to their passengers, and this rule has been frequently held to be none the less operative when the evidence of the passenger's right to travel was put in the form of a free pass, if, in fact, there was a consideration for the issuance of it: *Railroad Co. v. Lockwood*, 17 Wall. 357; *Railway Co. v. Stevens*, 95 U. S. 655.

The cases above cited expressly refrain from any expression of opinion as to what the law would be were the pass purely a gratuity with a condition against liability. There are dozens of such cases as *Railroad Co. v. Lockwood*, 17 Wall. 357, in the reports, and the language of many of them is fully strong enough to justify counsel in claiming that they would cover the case of a gratuitous pass with conditions. However, nearly all of them are cases where drovers or ⁵²⁰ other shippers, being under the necessity of accompanying their shipments of stock or other merchandise to properly care for it while in transit, were granted transportation without payment of fare *eo nomine*, but where the federal supreme court found that there was a valuable consideration and therefore a contract of carriage for hire. But of all the cases called to our attention, or discovered by us in a somewhat extended examination of the subject, there are but eight where the naked question of liability under a free pass with conditions was presented. There may be some others, but they are most likely to be found in New York and Illinois, where the right of a carrier to contract against liability has long been recognized in some form or other.

Illinois Central R. R. Co. v. Read (1865), 37 Ill. 484, 87 Am. Dec. 260, held that a passenger traveling on such a pass could not recover; also *Kinney v. Central R. R. Co.* (1869), 34 N. J. L. 513; 3 Am. Rep. 265; *Jacobus v. St. Paul etc. Ry. Co.* (1873), 20 Minn. 125; 18 Am. Rep. 360, held the opposite, as did *Rose v. Des Moines etc. Ry. Co.* (1874), 39 Iowa, 246; *Griswold v. New York etc. R. R. Co.* (1885), 53 Conn. 371, 55 Am. Rep. 115, and *Annas v. Milwaukee etc. R. R. Co.* (1886), 67 Wis. 46; 58 Am. Rep. 848, held there could be no recovery. *Gulf etc. R. R. Co. v. McGown* (1886), 65 Tex. 643, followed Minnesota and Iowa, but *Quimby v. Boston etc. R. R. Co.*

(1890), 150 Mass. 365, decided against recovery. The Iowa case was largely based upon a statute of that state, which was construed to prohibit any attempt at limitation by the carrier.

We have given these cases in their order of time, so that it may be seen that there is no absolute weight of authority on this subject. The language of the most of the text books, of which a dozen or more have been cited, is, so far as any opinion is expressed, for the most part favorable to a right of recovery in such cases; but Beach on ⁵³¹ Contributory Negligence, section 172, and Patterson's Railway Accident Law, page 505, are the only books of this class which give any consideration to the cases above cited.

There can be no question as to the propriety of that rule of law which prohibits a common carrier from forcing upon any person who deals with it in its public capacity a condition against liability arising from its own negligence. The very idea of a public or common carrier, with its features of monopoly and right of eminent domain, bears with it, to the modern mind, the duty of conveying passengers with safety, so far as its own acts are concerned, upon the payment of reasonable compensation. The duty which the carrier owes to the public and to the individual is to perform the service safely, without any limiting conditions; and therefore such conditions, when the imposition of them is attempted, violate an implied duty and are justly held void.

But when the intending passenger proposes to the carrier that it do something for him which it is not, under any conceivable circumstances, required by law or duty to do, viz., to carry him without any compensation whatever, and when the whole matter is at the option of either party to agree or not, it is difficult to see why public policy should step in and deny the right of the carrier to limit its chances of loss in the operation, even though a careless servant cause unintentional injury to the passenger. The theory that the granting of passes upon condition like this will tend to demoralize the servants of railway and other carriers, and thereby imperil the limbs and lives of paying passengers, seems to us mere fancy; and yet this is about the only consideration urged by those courts which hold that there is a public policy in the way of such agreements. Absolutely gratuitous passes represent but an infinitesimal portion of the mileage actually traveled, and of all the passengers ⁵³² carried, but an infinitesimal

number are injured by the carrier's negligence. The precautions adopted by managers and employees of land and water transportation companies are not gauged by the fact that there may be free passengers aboard, and never will be while the doctrine of *respondet superior* has its present healthy existence. Considerations of business success, of competition, of the preservation of expensive machinery, of continuance in employment, of the safety of their own lives and limbs, and, to some extent at least, of humanity, have incalculably more influence upon the servants of these carriers in making them careful than any thought of damage suits in favor of free passengers. It is only in the rarest instances that disasters of this kind occur through recklessness, or through any other cause than the innate weakness of human nature, which cannot forever maintain a perfect guard.

The cases from Massachusetts, New Jersey, and Wisconsin above cited seem to us to present, by conclusive argument, the better reason on this subject, and we adopt the views therein expressed, and hold that the person who accepts a pass with such conditions indorsed on it as those alleged in this case, is bound by their terms. It follows that the demurrer to the first defense should have been overruled.

The nonsuit asked by appellant was properly refused. We do not think it can be said that it is negligence *per se* for a passenger to stand upon the front platform of the trail car in a moving cable train, in the absence of any rule of the company against it, and where it has been the custom for passengers to occupy that position. Doubtless there is more liability that accidents will occur where a car is propelled by cable than where horses are used; but common experience has not discriminated between the two to the extent of changing the rule of law. In most cases of ⁵³³ this class the question of contribution is one for the jury: *Wills v. Lynn etc. R. R. Co.*, 129 Mass. 351; *Nolan v. Brooklyn etc. Ry. Co.*, 87 N. Y. 63; 41 Am. Rep. 345.

If the question of the conditional pass be not in the case, and the jury find that the appellant was negligent in causing the sudden stoppage of the car, and that no failure of respondent to use ordinary care to preserve himself from the danger of such accidents contributed proximately to produce his injury, then, upon a new trial, respondent will be entitled to recover; otherwise he will not.

Judgment reversed, and cause remanded, with directions to overrule the demurrer to the first defense, and proceed with a new trial.

DUNBAR, C. J., and HOYT, SCOTT, and ANDERS, JJ., concur.

RAILROADS—LIABILITY TO PERSONS TRAVELING ON PASSES.—One traveling on a free pass is precluded from recovering for injuries suffered by him through the negligence of the company or its agents, by a stipulation indorsed on the pass to the effect that the company shall not be liable under any circumstances for the negligence of its servants or otherwise: *Ulrich v. New York etc. R. R. Co.*, 108 N. Y. 80; 2 Am. St. Rep. 369, and note, with the cases collected. See, also, *McVeety v. St. Paul etc. Ry. Co.*, 45 Minn. 268; 22 Am. St. Rep. 728, and *Brewer v. New York etc. R. R. Co.*, 124 N. Y. 59; 21 Am. St. Rep. 647, and especially note.

STREET RAILWAYS—CONTRIBUTORY NEGLIGENCE OF PASSENGER—RIDING ON PLATFORM.—One who takes a seat on the dummy of a cable-car, when he can sit inside of the car with safety, is not guilty of contributory negligence: *Hawkins v. Front Street etc. Ry. Co.*, 3 Wash. 592; 28 Am. St. Rep. 72. It is not necessarily negligent for a passenger to ride on the front platform of a street-car: *Nolan v. Brooklyn etc. R. R. Co.*, 87 N. Y. 63; 41 Am. Rep. 345, and extended note; *Thirteenth Street etc. Ry. Co. v. Boudrou*, 92 Pa. St. 475; 37 Am. Rep. 707, and extended note; *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104; 11 Am. St. Rep. 617. While in *Andrews v. Capital etc. R. R. Co.*, 2 Mackey, 137, 47 Am. Rep. 266, it was held that if there is standing room inside a street-car, with pendant straps for holding on, it is negligent to ride on the platform.

WILEY v. CITY OF SEATTLE.

[7 WASHINGTON, 576.]

MUNICIPAL CORPORATIONS—EMPLOYMENT OF SPECIAL COUNSEL—LIABILITY OF CITY.—The employment of special counsel by the mayor of a city to defend him in *mandamus* proceedings to require him to sign an illegal issue of bonds, when the legislative and judicial departments of the city are arrayed against him, and refuse to furnish him with counsel, renders the city liable for the services of such special counsel, although their employment by the mayor was contrary to the city charter.

MUNICIPAL CORPORATIONS—POWER OF MAYOR TO EMPLOY SPECIAL COUNSEL.—Although, as a general rule, the mayor of a city has no authority by virtue of his office to authorize litigation in behalf of the city, or to employ special counsel to represent him or it, yet cases of emergency may arise when such power must necessarily exist, though contrary to the charter provisions of the city.

Wiley and Bostwick, for the appellants.

George Donworth and James B. Howe, for the respondent.

576 STILES, J. Appellants suffered a nonsuit in an action which they brought against the respondent for the services

which they rendered, as attorneys for the defendant, in the case of *Chalk v. White*, 4 Wash. 156.

Their offers of proof were to the effect that after the mayor had vetoed the ordinance authorizing the issuance of the illegal bonds, it was passed by the unanimous vote of both of the bodies which constitute the legislative authority of the city, under the advice of the corporation counsel that such action was within their power; and that when he was served with the alternative writ of *mandamus* requiring him to sign the bonds, the mayor applied to the corporation counsel to defend him in the action, and was refused on the ground of the opinion he had given the ⁵⁷² council, because he believed his advice was right, and because he could not honorably at that time, and under such circumstances, take the other side. This refusal and these reasons were put in writing and delivered to the mayor, and the counsel also refused to permit any of his assistants to act for the defense. The mayor then canvassed the members of both houses of the council, and found them unwilling to act favorably upon any ordinance which might be proposed looking to the employment of special counsel, and thereupon took his own course, and secured the successful services of the appellants. But, notwithstanding the result of the case, the auditing powers of the city would allow no compensation for the services rendered, or return of money expended, and hence this suit.

The ruling of the court below on the motion for a nonsuit was based upon the stringent language of the charter of the city, and the general rule of municipal corporations that where the manner of exercising a power conferred upon a corporate agent is laid down in terms, his action, in order to be legal, must be taken in strict conformity to the mode thus prescribed: *Arnott v. Spokane*, 6 Wash. 442.

It is evident from the general tenor of this charter (freeholders', 1890) that it was the endeavor of its framers to require authority for every sort of expenditure to emanate from some legally constituted source, and in a formal and unmistakable way. In fact, a charter could hardly be conceived that would be more mandatory in its restrictions upon municipal officers. A corporation counsel was included among the officers of the city, whose duty it was, among others, to defend all actions and proceedings to which the city or any officer, board, or department of the city should be a party, or in which the rights or interests of the city should be involved;

and by an ordinance this officer could be allowed to employ one or more assistants. ⁵⁷⁸ The council would also have authority, under the general powers conferred upon it, and with the concurrence of the mayor, to employ such special counsel in particular cases as it should deem necessary.

But on this subject there was this provision: "No office shall be created, nor shall any person be employed in any capacity . . . unless the same is specially provided or authorized by law or this charter." Nothing could be imagined that would more completely tie the hands of an officer in the matter of employing counsel than this provision. It was the council's manifest duty, notwithstanding its hostility to the mayor's position, to provide him legal assistance, when the attitude of the corporation counsel was made apparent; but it could not be controlled in the matter, and it would undoubtedly have refused. The mayor was then in this position: The constitution, the statute law, and the charter itself forbade him to sign the bonds or do any thing towards putting them in circulation, and under the solemnity of his official oath he was bound to obey; but, on the other hand, the ordinance passed over his veto by unanimous votes, and the alternative writ of *mandamus* from the court commanded him to proceed. It was a most important case, involving the city's liability for more than seven hundred thousand dollars, which no man in official position ought to be required to submit to a court without legal assistance. He could neither stand still, advance, nor retreat without peril; and yet the charter laid upon him the express duty to see that all laws and ordinances in force in the city were faithfully executed under penalty of removal from his office.

Respondent's counsel intimate that, under the circumstances, the mayor had such a personal interest in the defense of the action brought against him that he should have himself employed the necessary assistance; but there is equally as strong an implication that he was not expected ⁵⁷⁹ to do any such thing in the provision that the corporation counsel shall defend the officers in all actions against them involving the interests of the city. Plainly it was city's business that was in jeopardy in *Chalk v. White*, 4 Wash. 156, and if the appellant was to any extent bound to employ counsel in that case the city is bound to pay the reasonable value of the services rendered. That he was so bound we consider to be demonstrated by the success of the defense, which proved the cor-

rectness of his position, and saved the city from an immense apparent liability.

This case demonstrates that there is, as in the nature of things there must be, such a thing as an emergency in the affairs of a municipal corporation, as well as in those of private corporations and individuals, for which neither laws, charters, nor ordinances expressly provide. We venture that it was never contemplated by the framers of this charter that any such a condition of affairs as was developed in this case would occur, where both the legislative and the judicial departments of the city would be arrayed against its chief executive to compel him to perform an illegal and unconstitutional act; and if it had been intended by the charter to cover such a case, then the answer to that proposition would be that municipal corporations are not clothed by the constitution or the laws with power, either directly through their charters or ordinances, or indirectly through the failure or refusal of their officers to act, to prevent the honest and proper efforts of an executive officer to avoid a plain violation of the general law.

This corporation is the creature of the state, and must exist whether its people will or not, if the law of its creation is a valid law. But suppose some individual should make a direct attack upon its existence, and seek, through judicial action, a judgment that it was no corporation, and the same departments which opposed the mayor in *Chalk v. White*, 4 Wash. 156, should take the position that the plaintiff was ~~see~~ right and ought to have judgment; the mayor in that case would be in a far less responsible position than he was in the bond case, yet if he should employ counsel and defeat the action, it would be a strange thing, indeed, if the cost of that defense could not be recovered from the city whose duty it was, under the law to make it.

But the case supposed is no stronger than the one before us. Paramount laws were to be upheld, and a paramount duty lay upon the city to uphold them. The city, violating its own self-made charter, in its corporate capacity failed to respond to the duty imposed upon it, but the officer whom it had employed and sworn to be its faithful agent in such cases, performed his part with the only means available, and his authority to employ those means in the emergency must be conceded. To hold otherwise would be to let chaos rule, since officers are under no legal obligation to defend suits of

this kind at their own expense, their patriotism not being a fund upon which municipal corporations have a right to draw for such purposes.

The rule of law above alluded to, that when the mode in which a municipal corporation may contract is specially and plainly prescribed and limited, that mode is exclusive, and must be pursued or the contract will not bind the corporation, is firmly settled, and is supported by almost universal authority: Dillon on Municipal Corporations, 4th ed., sec. 449, and cases cited in note 2. But none of the cases cited to our attention by the respondent reach the point that is in issue here. *Butler v. City of Charlestown*, 7 Gray, 12, came nearest to it; but in that case it did not appear that there was any unwillingness on the part of the corporation to furnish the aldermen who resisted an unconstitutional law with legal assistance; on the contrary, the case was rested upon what was assumed to be a custom of the city to permit committees and officers to make such contracts; and there was no responsibility resting upon the aldermen ⁵⁸¹ to make any resistance to annexation of Charlestown to Boston.

Two recent cases are cited by the appellants, however, one of which is practically on all fours with the case at bar: *Barnert v. Paterson*, 48 N. J. L. 395, and *City of Louisville v. Murphy*, 86 Ky. 53; and in both cases the right of the mayor to employ counsel in such emergencies was upheld. In the former case the mayor successfully resisted an attempt to compel him to sign illegal bonds; in the latter he sought to enjoin the collection of an alleged illegal tax.

We think the case before us presents as strong a case of emergency as could be made, and that the appellants were entitled to make their proofs and have judgment for what their services were reasonably worth, as well as their necessary disbursements.

Judgment reversed, and cause remanded for a new trial.

DUNBAR, C. J., and SCOTT, J., concur.

ANDERS and HOYT, JJ., dissent.

MUNICIPAL CORPORATIONS—EMPLOYMENT OF SPECIAL COUNSEL.—When the county commissioners of a county employ attorneys to defend a suit in which the county is interested, an action may be maintained against the board for the compensation of such attorneys: *Thacher v. Commissioners*, 13 Kan. 182. Even though a city charter provides for a city attorney to attend to the business of the city, the authorities may employ other coun-

nel when necessary: *Smith v. Mayor*, 13 Cal. 531; *Hornblower v. Duden*, 35 Cal. 664. County commissioners have authority to employ attorneys to protect the interests of their counties, and to bind the county by contracts for the payment of such attorneys: *Ellis v. Washoe County*, 7 Nev. 291; *Clarke v. Lyon County*, 8 Nev. 181; *Wilhelm v. Cedar County*, 50 Iowa, 254, and a town is bound in the same way for fees of attorneys employed to defend its interests by its council: *Mt. Vernon v. Patton*, 94 Ill. 65; *State v. Heath*, 20 La. Ann. 172; 96 Am. Dec. 390. When the mayor of a city, who was a lawyer, without fraud or collusion, was employed by the common council to appear in a suit for the city, his employment was held valid, and he was declared entitled to the value of his services: *Mayor etc. v. Mummy*, 33 Mich. 61; 20 Am. Rep. 670. A municipal corporation may, without express authority, employ special counsel to attend to its interests in another state: *Memphis v. Adams*, 9 Heisk. 518; 24 Am. Rep. 331. In *Carroll v. St. Louis*, 12 Mo. 444, it was held that the mayor of St. Louis has no authority under the city ordinance to appoint an attorney so as to make the city liable for his services. To the same effect see *City of Bryan v. Page*, 51 Tex. 532; 32 Am. Rep. 637.

HOGAN v. KYLE.

[7 WASHINGTON, 595.]

VENDOR AND PURCHASER—CONTRACT FOR SALE OF LAND—ACTION FOR PURCHASE PRICE.—In an action by the vendor to recover for a breach of a contract for the sale of land, he cannot retain the title thereto and recover the entire purchase price.

VENDOR AND PURCHASER—BREACH OF CONTRACT FOR SALE OF LAND—MEASURE OF DAMAGES.—In an action at law by a vendor to recover damages for the breach of a contract for the sale of land, the measure of damages is not the contract price, but the difference between that price and the price for which the land could have been sold at the time of the breach, and such damages must be alleged and proved like any other fact in the case.

VENDOR AND PURCHASER—BREACH OF CONTRACT FOR SALE OF LAND—REMEDY.—In case of a breach of contract for the sale of land the vendor can either sue at law for damages or resort to equity for specific performance.

VENDOR AND PURCHASER—BREACH OF CONTRACT FOR SALE OF LAND—SUFFICIENCY OF COMPLAINT.—A complaint based upon a contract for the sale of land providing for a cash payment of one-third of the purchase price and the balance in two equal installments, time being made of the essence of the contract, and the complaint simply alleging the contract, failure to pay, the ownership of the property, and the tender of a good deed prior to the commencement of the suit, is insufficient either at law or in equity to authorize the recovery of a money judgment for the deferred payments when the suit is not instituted until more than two years after the maturity of the last installment, and the delay is wholly unexplained.

VENDOR AND PURCHASER—BREACH OF CONTRACT FOR PURCHASE OF LAND—SUFFICIENCY OF COMPLAINT.—A complaint in an action to recover the purchase price for a breach of a contract to purchase land, which on its

face shows such a delay on the part of the vendor in bringing his action, that, unexplained, it amounts to a waiver of his rights under the contract and an acceptance of a forfeiture, is clearly insufficient to authorize a recovery, especially when time is made the essence of the contract.

Preston, Albertson, and Donworth, for the appellant.

H. B. Slauson, for the respondent.

⁵⁹⁶ DUNBAR, C. J. On the twenty-seventh day of February, 1890, respondent and appellant entered into a written contract, wherein respondent agreed to sell the appellant certain real estate for the sum of two thousand five hundred dollars, one-third of which was paid at the time of the execution of the contract, appellant to pay the balance of the purchase price in two equal installments, the first of which was to be paid on the twenty-seventh day of May, 1890, and the second on the twenty-seventh day of August, 1890. Time was expressly made the essence of the contract. The appellant paid no part of the purchase price except the sum which was paid at the time the contract was executed. It does not appear that defendant entered into possession of the property or exercised any control over it.

On November 14, 1892, suit was commenced by the respondent to recover a money judgment against the appellant for the amount of the two unpaid installments, with interest. The complaint simply alleged the making of the contract, failure to pay, the ownership of the property, and the tender of a good and sufficient deed prior to the commencement of the action. A demurrer was interposed to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant answered, alleging possession in the respondent, but denying his power to give good title, alleging that respondent had never demanded of appellant the contract price of the land at any time prior to November 14, 1892, the date of the commencement of the action, and never tendered to appellant any deed or conveyance purporting to convey said land until said fourteenth day of November, 1892, and never at any time conveyed said premises. That long prior to said last-named date appellant had informed and notified respondent that he did ⁵⁹⁷ not have or claim any further interest in said property, and that he would not pay any further installment provided for by said contract, and that the plaintiff did not, up to said November 14, 1892, assert any further right to the

balance of said contract price, nor dissent to nor deny said claim of defendant that he was no longer bound by said contract; and that long prior to said last-named date the plaintiff had exercised said option reserved to him under said contract, and had elected to rescind said contract and to retain as a forfeit the first payment that had been made to him by the defendant thereunder aforesaid.

At the outset of the trial appellant objected to the introduction of any testimony in behalf of the plaintiff, on the ground that no cause of action was stated in the complaint. This objection was overruled. At the conclusion of respondent's testimony appellant moved for a nonsuit, which motion was overruled. Thereupon he rested upon his motion, and did not offer any testimony, and the judge instructed the jury to bring in a verdict against the appellant for the balance of the contract price, with interest, which being done, judgment was entered thereon, from which judgment appellant has appealed.

At the commencement of the action the appellant moved to have the case transferred to the equity calendar, which motion was denied. The demurrer and the motion for a nonsuit raised substantially the same questions.

The judgment in this case will have to be reversed in any event, for, under its terms, the respondent recovers the full purchase price, and is allowed to retain the land which represented the purchase price. In this case these are dependent obligations upon which the respondent is suing. When the first installment became due he could have recovered the amount then due as upon an independent contract, but having elected to wait until the last installment became due, and upon the payment of which defendant ⁵⁹⁸ would be entitled to a deed, the obligations become dependent. They all relate back to the contract, and respondent cannot sustain an action for either installment without proof of performance, or readiness to perform on his part: *McCroskey v. Ladd*, 96 Cal. 455, and cases cited.

In that case the court said: "There is but one single cause of action, one and indivisible. The defendant, if he would obtain his deed, must pay all, and the plaintiff, if he would recover, must show such a performance on his part as would entitle him to all the unpaid consideration."

It is not enough that the deed was tendered at any particular time, but the tender must be kept good, so that it may be taken into consideration in the entry of the judgment.

Plaintiff here simply shows that the tender had been made prior to the commencement of the action, and it is therefore insufficient, excepting on the theory that the judgment could be rendered independent of the performance of his part of the contract by the vendor, which would result in allowing the vendor to keep both the money and the land. On that proposition we quote from Warvelle on Vendors, page 961: "There are cases, both in England and the United States, where, on the vendee's default, the vendor, having offered to perform, has been permitted to recover as damages the whole purchase price. The injustice of such a measure, however, is apparent on its face, for it gives the vendor his land as well as its value, and is not now regarded as a correct rule in either country."

The rule in such cases is, that the vendor has a right to the fruits of his bargain, and is entitled to compensation for any loss he may suffer by reason of its non-consummation. What his damages are in such circumstances must be alleged and proven like any other fact in the case. Under one set of circumstances the measure of damages might be ⁵⁹⁹ one thing, and under other circumstances the measure might be governed by an entirely different rule. The land may have deteriorated in value, and his damages would be great, or it might have increased in value, and the damages would be nominal. As is well argued by the appellant in this case, so far as the complaint reveals, the land may be worth as much or more than it was when the agreement was executed, and the respondent, having received an advance payment which is forfeited, may actually be benefited. The cases cited in Warvelle fully sustain the announcement in the text, both as to the unfairness of allowing the vendor to retain the land and the money, and as to the measure of damages.

In *Old Colony R. R. Co. v. Evans*, 6 Gray, 25, 66 Am. Dec. 394, it was held that in an action at law by the vendor to recover damages for the breach of a contract for the sale of land the measure of damages is not the contract price, but the difference between that price and the price for which the land could have been sold at the time of the breach. Under this rule, which seems to us to be an equitable one, and one which is adopted by many courts, the complaint is plainly deficient. The case last above cited also holds that a vendor may enforce in equity the specific performance of a written contract for the sale of land. In fact the prevailing modern authority is, that in a case of this kind the vendor can either

sue at law for damages or resort to equity for specific performance.

Mr. Pomeroy, in his work on Contracts, page 6, bases his adherence to this doctrine on the ground of mutuality. The remedy which is enjoyed by one party to a contract must be enjoyed by the other, and, as an example, he gives the simplest form of contract for the sale of land, when the vendor agrees to convey, and the purchaser merely promises to pay a certain sum as the price, since the latter may, by a suit at equity, compel the execution and delivery of ~~the~~ the deed, the former may also, by a similar suit, enforce the undertaking of the vendee, although the substantial part of his relief is the recovery of money.

"A suit in equity against the vendee to compel a specific execution of a contract of sale, while in effect an action for the purchase money, has nevertheless always been sustained as a part of the appropriate and acknowledged jurisdiction of such court, although the vendor has, in most cases, another remedy by an action at law upon the agreement": Warvelle on Vendors, 779, 780, and cases cited.

So that, considering it either as a legal or equitable action, and considering the complaint amended so as to incorporate the allegations of tender sought to be set up in the reply, the action must equally fail; for the complaint on its face shows such a delay on the part of the respondent in bringing his action; that, unexplained, it amounts to a waiver of respondent's rights under the contract, and an acceptance of the forfeiture.

"The court of chancery was at one time inclined to neglect all consideration of time in the specific performance of contracts for sale, not only as an original ingredient in them, but as affecting them by way of laches. But it is now clearly established that the delay of either party in not performing its terms on his part, or in not prosecuting his right to the interference of the court by the institution of an action, or lastly, in not diligently prosecuting his action when instituted, may constitute such laches as will disentitle him to the aid of the court, and so amount, for the purpose of specific performance, to an abandonment on his part of the contract": Fry on Specific Performance of Contracts, sec. 1070.

"The doctrine of the court thus established, therefore, is that laches on the part of the plaintiff (whether vendor or purchaser), either in executing his part of the contract or in

applying to the court, will debar him from relief. 'A party cannot call upon a court of equity for specific performance,' said Lord Alvanley, M. R. (u), 'unless he has shown himself ready, desirous, prompt, and eager,' or, to ⁶⁰¹ use the language of Lord Cranworth, 'specific performance is relief which this court will not give, unless in cases where the parties seeking it come promptly, as soon as the nature of the case will permit': Fry on Specific Performance of Contracts, sec. 1072. To the same effect: Pomeroy on Contracts, sec. 408, and cases cited.

It is true that a few of the states, notably Ohio, hold that the laches must fall outside of the statutes of limitation; but the great weight of authority, as we have been able to gather it from the cases is to the contrary, and relief has been refused on the principle that acquiescence for an unreasonable length of time after the party was in a situation to enforce his right under the full knowledge of the facts, was evidence of a waiver or abandonment of right. And what shall be deemed a reasonable time must be determined from the circumstances of the case; six months in some cases might be as unreasonable as six years in others.

It must be borne in mind that a distinction is made in the discussion of the cases between the cases where time is made the essence of the contract and where it is not; and the conclusion deduced from the authorities is that where time is made the essence of the contract, the apparent delay or omission of duty must be explained, or the relief will not be granted.

In this case time was made the essence of the contract by express terms. The complaint shows that there was no attempt to enforce the claim until two years and three months after the contract matured, and makes no explanation whatever for the delay. Nor are the averments of the complaint strengthened by the proofs; for the proofs show that no demand of any kind whatever had been made on the part of respondent until the day the suit was brought. The respondent should not be allowed to speculate in values, so far as this contract is concerned; to ⁶⁰² wait and see whether the value of the land would enhance or depreciate before he made his election either to enforce the performance or accept the forfeiture.

We think the provisions of this contract that "if the said party of the second part, his heirs, administrators, or assigns,

shall fail to pay the full amount of either of the above specified installments and interest when the same shall become due as above specified, the said party of the first part shall have the right, at their option, to rescind and cancel this agreement, and in case of such rescission and cancellation, all rights of the said party of the second part, his heirs and assigns, shall be terminated, and all payments heretofore made on this contract shall be forfeited," fairly construed, guarantees to the respondent a right which it must exercise at the maturity of the contract; the time when he would have a right to make the election; and as he did not proceed to enforce the contract, the appellant had a right to presume that inasmuch as he had taken no affirmative action by tendering the deed, he had elected the remedy which was consistent with silence, namely, the acceptance of the forfeiture; and considering the rapid changes in value of the real estate in this country, we think an unexplained delay of two and a quarter years ought to prevent the respondent from asserting his claim in a court of equity.

The complaint, therefore, being insufficient, either at law or equity, appellant's demurrer should have been sustained. This conclusion renders unnecessary the discussion of the other errors assigned. For the reasons given the judgment will be reversed, with instructions to sustain appellant's demurrer to the complaint.

STILES, HOYT, SCOTT, and ANDERS, JJ., concur.

VENDOR AND PURCHASER—BREACH OF CONTRACT BY PURCHASER—REMEDIES OF VENDOR.—Under a contract for the purchase of land providing that the vendor may declare the contract void, and take possession on failure of the vendee to perform the conditions, the vendor may, upon the abandonment of the contract and premises by the vendee, either maintain a bill for specific performance, or a suit at law for the purchase price, or for repossession and damages for the breach of contract: *Allen v. Moan*, 86 Mich. 328; 24 Am. St. Rep. 126, and note. A vendor may maintain a bill for the specific performance of a contract to purchase land where the vendee refuses to accept a conveyance or pay the purchase money, notwithstanding the remedy at law for the purchase money: *Andrews v. Sullivan*, 2 Gilm. 327; 43 Am. Dec. 53; *Old Colony R. R. Corp. v. Eeans*, 6 Gray, 25; 66 Am. Dec. 394, and note. A judgment may be entered against a purchaser of land who has refused to comply with his contract, making him liable for the amount which he agreed to pay: *Kennedy v. Gramling*, 33 S. C. 367; 26 Am. St. Rep. 676. Upon the refusal of the vendee to perform a contract for the purchase of real estate, the vendor has two remedies, one to recover damages, and the other for specific performance: *Smyth v. Sturges*, 108 N. Y. 495. A vendor retaining a lien for the purchase money until he elects his remedy may sue either for

the land or for the purchase money with foreclosure: *Stone Land etc. Co. v. Boon*, 73 Tex. 548. See, also, the notes to *Motes v. Browning*, 60 Am. Dec. 244; and *Hanna v. Wilson*, 46 Am. Dec. 192.

VENDOR AND PURCHASER—MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO PURCHASE.—The measure of damages in a suit by the vendor for breach of a contract to purchase land is the difference between the contract price and the value of the land at the time of re-entry and abandonment of the contract by the vendee, less what has been paid: *Allen v. Mohr*, 86 Mich. 328; 24 Am. St. Rep. 126, and note, with the cases collected; *Old Colony R. R. Corp. v. Evans*, 6 Gray, 25; 66 Am. Dec. 394, and note. See, also, *McGuinness v. Whalen*, 16 R. I. 558; 27 Am. St. Rep. 763, and note.

INDEX TO THE NOTES.

ABANDONMENT OF LEASE by tenant, when justifiable, 478-485.

AGIETER'S LIEN, cannot be created by person not the owner of the property, 305.

APPEAL BONDS, actions upon, answers in, 719.

actions upon cannot be sustained until after final judgment, 712.

actions upon cannot be sustained until plaintiff is entitled to execution, 712.

actions upon, complaint in need not allege matters of law, 718.

actions upon, complaint in, what must aver, 718.

actions upon, complaint in, what objections to must be urged by demurrer, 718.

actions upon may be sustained though there is a remedy by motion, 714.

actions upon may be sustained without first issuing execution, 714.

actions upon, who entitled to maintain, 714.

ambiguities in, 705.

attorneys' fees are not generally recoverable in actions upon, 717.

bankruptcy, discharge of judgment debtor in, 711.

breach of any condition in will sustain an action thereon, 713.

change of parties after appeal has been taken, 710.

concurrent remedies upon, 714.

condition that appeal should be prosecuted with effect, meaning of, 703.

conditions of need not follow the precise words of the statute, 704, 705.

conditions of which the court had no authority to prescribe, 705.

consideration of need not be expressed therein, 704.

consideration supporting, what is, 704.

construction of, rules applicable to, 703.

costs of suit are secured by, 715.

costs, what are recoverable in actions upon, 716.

death of the principal does not release the sureties, 710.

defective execution of, when releases sureties, 704.

defenses available in actions upon, 719.

delay in prosecuting the action does not release the sureties, 712.

discharge of the judgment releases the sureties, 713.

dismissal of appeal because the court had no jurisdiction, 703.

dismissal of appeal is equivalent to an affirmance of the judgment, 703.

estoppel against sureties to deny existence of the judgment appealed from, 719.

estoppel arising from recitals in, 709.

enforcement of by summary proceedings, 714.

final decision is necessary to complete the liability of the sureties, 707.

fraud in inducing the sureties to sign, 710.

fraud or collusion in conducting the appellate proceedings, 710.

APPEAL BONDS, for all damages and costs do not include the payment of the judgment itself, 715.

in actions for the recovery of land, when include rents and profits, 717.

in foreclosure proceedings, measure of recovery upon, 715, 716.

in suits other than for the payment of money, measure of liability, 716.

informalities in, 704, 705.

interest on the judgment is secured by, 715.

interest, when recoverable in actions upon, 717.

interpretation of, 702, 703.

judgment against principal, conclusiveness of against sureties, 712.

justification of the sureties is not essential to validity of, 706.

law is a part thereof and need not be stated therein, 704.

legislature cannot enlarge the effect of, 711.

liability of sureties does not exist where the principal is not liable, 712.

liability of sureties, when complete, 707.

measure of damages in injunction cases, 718.

measure of recovery upon, 714.

mistake of surety as to legal effect of, 710.

mistake of surety, reforming bond on account of, 710, 711.

motion for judgment upon, 714.

not signed by a principal are valid, 704.

omission of names of sureties in the body of, 704.

omitted words, when will be supplied, 705.

parties are not required to consult sureties as to steps subsequently taken in the proceeding, 711.

penalties recoverable upon cannot exceed amount of, 715.

performance of one condition of, when no defense to an action for the breach of another, 713.

pleadings in actions upon, 718, 719.

release of sureties by agreement made by the parties, 711.

release of sureties by releasing securities, 712.

release of sureties by satisfaction of the judgment, 713.

release of sureties by tender of satisfaction of the judgment, 713.

release of sureties does not result from taking additional security, 712.

rents and profits, when secured by, 717.

reversal of the entire judgment releases the sureties, 709.

reversal of the judgment as to some only of the defendants, 709.

rules applicable to other bonds applied to, 703.

second appeal, when included within the terms of, 707, 708.

statute of limitations applicable to actions upon, 714.

summary proceedings, enforcement of, by, 714.

surety is entitled to stand on the express terms of his contract, 702.

surety of an infant or a married woman is bound, though his principal is not, 713.

to pay the judgment in a particular court or place do not require its payment elsewhere, 707.

variations in, from statutory forms, 704, 705.

void where no appeal is allowed, 706.

where no appeal is allowed are void, 706.

ATTACHMENTS, mistake in affidavit for, 747.

BAILLES, gratuitous, liability of, 779-781.

BANKS acting as bailees without reward, liability of, 780, 781.

agents of, liability for negligence or embezzlement of, 776, 784.

- BANKS**, burden of proof in actions for loss of special deposits by, 783.
- burglary and robbery, liability for, 784.
- care required of directors of, 773.
- collateral securities, banks are not gratuitous bailees of, 779, 781.
- collateral securities, care which must exercise to safely keep, 778.
- collateral securities, duties of, as to safekeeping, 778.
- collecting agencies, correspondents, liability for acts of, 776.
- collecting agencies, duty of, to forward paper for presentment or protest, 777.
- collecting agencies, liability of, for acts of their immediate agents, 775.
- collecting agencies, persons to whom the paper is sent for collection, whether deemed the agents of the bank or not, 777.
- collecting agencies, skill and diligence which must exercise when acting as, 775.
- directors of, are for some purposes regarded as trustees, 774.
- directors of, are not insurers of the fidelity of agents appointed by them, 774.
- directors of, care which must exercise, 774.
- directors of, ignorance of, when no defense, 774.
- directors of, relations between them and the bank, 774.
- gratuitous bailees, liability of when acting as, 780-788.
- gross negligence in caring for special deposits, what is, 782.
- gross negligence, when essential to create liability against, 780.
- investment agencies may act as, 783.
- investment agencies, skill which must exercise when acting as, 787.
- liability of, for correspondents and subemployees, 776.
- misdelivery of special deposits, liability for, 786.
- negligence of, is presumed from loss of special deposits, 783.
- negligence of, when acting as collecting agencies, what is, 776, 777.
- notaries public are not deemed agents of the banks employing them, 776.
- notaries public, liability of, for acts of, 775, 776.
- notaries public, states holding banks liable for acts or negligence of, 776.
- notaries public, when deemed agents of the banks employing them, 776.
- officers, liability for acts respecting collections, 775.
- officers, thefts of, when liable for, 784.
- securities deposited to be exchanged are not held by gratuitous bailment, 780.
- skill and diligence which must exercise when acting for others, 774.
- special deposits, are not insurers of the safety of, 783.
- special deposits, are not regarded as gratuitous bailees of, though they act without reward, 781, 782.
- special deposits, burden of proof is upon the bank to show that it returned them or that the loss occurred without its fault, 783.
- special deposits, care for safety of must be such as persons of common prudence would employ, 782.
- special deposits, delivery of, to persons not entitled to receive them, liability for, 786.
- special deposits, diligence which must exercise for safety of, 781, 784.
- special deposits, gross negligence respecting, what is, 782.
- special deposits, held as collateral security, liability for, 778-780.
- special deposits, keeping of is within the duties of banks, 778.
- special deposits, loss of by embossment of their officers or agents, 786.
- special deposits, loss of by theft or burglary, 784.

- BANKS**, special deposits, misappropriation by officers is not the act of the bank, 785.
 special deposits, negligence is presumed from loss of, 783.
 special deposits, theft or embezzlement due to negligence of bank, 785.
 special deposits, without compensation, bank is liable for gross negligence in keeping of, 780.
 thefts of agents and employees, liability for, 784.
 wrongful act of agent, cannot take advantage of, 785.
- BROKERS**, commissions, when become entitled to, 689, 807.
- CARRIERS**, freight, consignor or shipper is presumed to be liable for, 402.
 freight, who liable for, 402.
- CONFLICT OF LAWS**, action in one state for negligence in another, 851.
 enforcement in one state of the laws of another, 178.
- CONSTITUTIONAL LAW**, jury trials in vagrancy cases, when may be dispensed with, 644.
 reform schools, statutes authorizing commitment of children to, when valid, 644.
 vagrants, statutes authorizing conviction of without trial are void, 644.
- CONVEYANCE**, of an estate held by the entirety, 435.
- CORPORATIONS**, estoppel to deny existence of, 212.
 estoppel to deny that officers were authorized to execute a promissory note, 460.
 proof of existence of, what sufficient, 212.
 treasurer of manufacturing, authority of to sign negotiable instruments, 459.
- CREDITOR'S BILL**, averments in, what essential, 115.
- CREDITORS**, assignment for benefit of, effect of in other states, 444.
- CRIMINAL LAW**, cross-examination of accused who has testified in his own behalf, 895-897.
 homicide, intent to produce death, when not essential to crime of murder, 80, 81.
 homicide, reckless shooting of another, 80.
 intoxication at the time of the commission of the crime, 92.
 malice is implied from reckless trifling with human life, 80, 81.
 malice is presumed from use of deadly weapon, 81.
- DAMAGES**, for mental anguish, whether recoverable, 586.
- DEED**, delivery of after death of grantor, when valid, 676.
 delivery of, what is, 467.
- DEFINITION**, of corporations *de facto*, 556.
 of double insurance, 136.
 of eviction, 485.
 of license, 473.
 of marketable title, 823.
 of partnership, 841.
 of reasonable doubt, 150.
 of trustee *de son tort*, 820.
 of vagrancy, 643.
- DIVORCE**, cruel treatment which will justify, 847.
- ENTIRETIES**, tenancy by, husband's life estate may be levied upon and sold, 436.
 tenancy by, in crops raised on lands held by, 436.
 tenancy by, in personal property, 534.

HUSBANDS, tenancy by, in personal property, husband's control over chattels held by, 436.

tenancy by, in personal property, husband's rights in, 436.

tenancy by, in personal property, rights of wife, how may be protected, 436.

ESTOPPEL, arising against married woman from her acts, 46.

EVICTION, of tenant by landlord, what is, 486-491.

EVIDENCE, opinions of witness as to correspondence between footprints at the place of the crime and the footprints of the defendant, 150.

opinions, when admissible, 150.

privileged communications, what are, 519.

FORFEITURE, for breach of conditions subsequent, how enforceable, 575.

FRAUDULENT CONVEYANCES, relationship between the parties as a badge of fraud, 519.

HOMESTEAD, attachment of, effect of subsequent abandonment of homestead, 248.

how to be claimed or abandoned in Arkansas, 248.

judgment liens against, 247.

levy of execution or attachment thereon is void, 247.

HUSBAND AND WIFE, burden of proof as to consideration paid for property purchased in name of wife during coverture, 44.

estoppel of married woman by her acts, 46.

parol easement or license, grant of by married woman, 45.

preferences in wife's favor when valid, 501.

presumption arising from wife's placing her money or property in husband's hands, 501.

purchase of property by wife of insolvent husband is regarded with suspicion, 44.

separate estate of wife, what is, 46.

INNKEEPERS, guests and boarders with, who are, 569.

lien of, 569.

INSURANCE, double, what will avoid policy, 136.

JUDGMENT, by default, effect of, 655.

beyond the issues is to that extent void, 702.

estoppel by, to what matters extends, 405.

in favor of physician as an estoppel against action for malpractice, 29, 30.

merger of, cause of action in, 820.

JURISDICTION, in admiralty, over what extends, 803.

JURY TRIAL, acquittal by the unauthorized discharge of the jury, 151.

in prosecutions for vagrancy, 644.

LANDLORD AND TENANT, abandonment because of partial eviction, 482, 484.

abandonment by tenant because landlord will not execute a written lease as agreed upon, 482.

abandonment by tenant because of acts of landlord affecting the enjoyment of the premises, 488, 489.

abandonment by tenant because of destruction of part of a leased building, 483.

abandonment by tenant because of injury to leased premises, 482.

abandonment by tenant because of the action of third parties, 484.

- LANDLORD AND TENANT**, abandonment by tenant because of title paramount, 484.
- abandonment by tenant for acts of the lessor interfering with the tenantable condition of the premises, 484, 485.
- abandonment by tenant for causes arising after the commencement of the tenancy, 482.
- abandonment by tenant for failure of the landlord to repair as stipulated in the lease, 483.
- abandonment by tenant for circumstances for which the lessor is not responsible, 484.
- abandonment by tenant on account of fraudulent representations, 481.
- abandonment by tenant, statutes authorizing, 482.
- abandonment by tenant, stipulations in lease justifying, 483.
- abandonment by tenant, what eviction will justify, 483.
- abandonment of lease because lessor did not put the tenant in possession, 481.
- abandonment of premises for defects which were discoverable, 478.
- abandonment of premises, right of tenant to make, 476.
- deceit, omission to inform tenant of condition of premises is not, 480.
- demise, implied covenants resulting from use of this word, 477.
- destruction of leased property or part thereof, when justifies abandonment by the tenant, 483.
- eviction by material change in the condition of the premises, 483.
- eviction, from what presumed, 486.
- eviction, instances of acts amounting to, 488.
- eviction, instances of acts which do not amount to, 487.
- eviction, intention of lessor to deprive tenant of the use of the premises is essential to, 484.
- eviction, mere tortious entry upon premises is not, 487.
- eviction, nuisance, existence of, when equivalent to, 490.
- eviction of tenant, what is, 485.
- eviction, partial, effect of, 491.
- eviction, what is, when a question of law, 486.
- eviction, what tenant may treat as, 484.
- fraudulent representations as to condition of premises which will justify tenant in abandoning, 481.
- furnished house, change in condition after commencement of lease, 480.
- furnished house, implied covenant as to fitness of, 479.
- latent defects, concealment of, whether justifies tenant's abandoning the premises, 478.
- rent, condition of premises, when will not relieve tenant from duty of paying, 478.
- rescission of lease by tenant, causes for, 476.
- warranty of fitness of leased premises is implied where it is stipulated that they shall be used for a specific purpose, 481.
- warranty that premises are suitable is not implied, 477.
- LAW**, of other states, enforcement of in this state, when will be permitted, 178.
- of other states, presumption respecting, 178.
- LABEL**, insolvency, charges of, 606.
- mercantile agencies, false publications by, 606.
- malice, when inferable, 606.

- LIEN**, lien of agister cannot be created by person not the owner of the property, 305.
- LIMITATIONS**, statutes of, acknowledgment from which new promise is implied, 422.
- MALICIOUS PROSECUTION**, advice of counsel as a defense, 856.
 probable cause, burden of proof respecting, 857.
 probable cause, when a question for the jury, 856.
- MASTER AND SERVANT**, acts of servant for which master is chargeable, 370.
 liability of master for servant's acts in violation of his orders, 370.
 superior servant, liability of master for negligence of, 398.
 wrongful discharge of servant, damages recoverable for, 253.
- MECHANIC'S LIEN**, description of property in claim of, when sufficient, 103.
- MEDICINES**, formulas of, right of persons to manufacture in accordance with, 564.
- MORTGAGE**, assignment of, how may be made, 683.
 to secure note maturing at different times, right to priority of payment, 888.
- MUNICIPAL CORPORATIONS**, liability of for services of special counsel, 909.
- NEGLIGENCE**, gross, what is, as applied to banks, 782.
 in one state, when gives rise to a cause of action enforceable in another, 851.
 of banks acting as bailees, 774-786.
 of banks acting as collection agencies, 777.
 of banks acting as investment agencies, 787.
 presumption of from accident on railway, 837.
 presumption of from loss of special deposits by a bank, 783.
- NOTARIES PUBLIC**, liability of banks employing, for negligence of, 776.
- NUISANCE**, on leased premises which will justify their abandonment by a tenant, 490, 491.
- PARENT AND CHILD**, custody, parent's right to, when forfeited, 66.
- PARTITION**, bill for, what must allege, 74.
- PAYMENTS**, carrier's right to appropriate, 104.
 checks, receipt of, when does not amount to, 625.
- PHYSICIANS**, degree of care and skill required of, 375.
 of different schools, ability required of, 375.
- PHYSICIANS AND SURGEONS**, burden of proof in action against for malpractice, 30.
 skill and care required of, 30.
- POSTMASTER**, liability of for negligence of his servants, 216.
- PRESUMPTION**, as to law of another state, 178.
 of negligence from loss of special deposit by bank, 783.
 of negligence, when arises from an accident, 837.
- PUBLIC LANDS**, patent to, issued without authority is void, 615.
- PURCHASER**, *bona fide*, actual payment is necessary to support claim of, 626.
- RAILWAY CORPORATIONS**, sick passengers, duties to, 560.
 special contracts limiting liability for injury to, when void, 240, 241.
- REAL PROPERTY**, trespassers upon assume the risk incidental to its condition, 222.
- RECEIVER**, appointment of, when justifiable, 116.
 discretion of court as to appointment of, 116.

REFORM SCHOOLS, are not prisons, 644.

commitment of children to without trial, 644.

SALES, delivery of goods to a carrier, when vests title, 508.

resale at risk of purchaser, 396.

title does not pass if purchaser retains the right to reject the goods, 628.

STATUTE OF FRAUDS, memorandum, when sufficient to satisfy, 133.

part performance of parol contract, what acts constitute, 393.

part performance of parol contract, when takes case out of, 393.

purchase money paid under contract void by, when may be recovered, 132, 133.

STREET RAILWAYS, care which must exercise for the safety of passengers, 760, 834.

TORT FEASORS, joint and several, liability of, 820.

satisfaction from one releases all, 820.

TRUSTS, *ex maleficio* arise when, 526.

VAGRANCY, arrest for without warrant, 646.

defined, 643.

divorce, when may be granted for, 646.

evidence sufficient to justify conviction of, 645.

evidence that the accused is a prostitute does not support conviction for, 645.

failure to work, when supports conviction for, 645, 646.

idleness, when justifies conviction for, 646.

indictment for, sufficiency of, 645.

jury trial, right to dispense with in accusations for, 644.

minor child is not guilty of, merely because it is disobedient, 645.

municipal ordinance, statute enlarging statutory definition of, 643.

statutes authorizing conviction of without trial are void, 644.

statutes respecting, when must be strictly construed, 643.

summary jurisdiction in cases of, 644, 645.

VENDOR AND PURCHASER, damages, measure of, for breach of contract to purchase, 917.

remedies of vendor for breach of contract to purchase, 916.

VENDOR'S LIEN, *bona fide* purchaser is protected from, 825.

waiver of, 825.

WILLS, attesting witness, testimony of as to mental capacity, 379.

capacity to make, nature and terms of will may be considered in determining, 378.

repugnant words in, when may be disregarded, 360.

services performed under promise to make, 393.

specific performance of contract to make, 393.

undue influence, whether may be presumed from unequal disposition of property, 378.

WITNESS, accused of crime, cross-examination of as to collateral matters, 896, 897.

accused of crime, cross-examination of as to matters not referred to in examination in chief, 895.

accused of crime, cross-examination of as to prosecutions for other acts, 896.

accused of crime, cross-examination of as to specific acts tending to discredit him or impeach his moral character, 897.

Witness accused of crime, cross-examination of cannot compel disclosure of confidential communications, 897.

accused of crime, cross-examination of in homicide cases, 896.

accused of crime, cross-examination of to test his credibility, 896, 897.

accused of crime, cross-examination of whether must be confined to matters referred to by him in his examination in chief, 895.

accused of crime, instances of proper cross-examination, 895-897.

accused of crime, may be compelled to write on his cross-examination, 895.

accused of crime, recalling for second cross-examination, 895.

accused of crime, testifying in his own behalf is subject to the same rules as other witnesses, 895.

accused of crime, testifying to part of a transaction must reveal the whole, 898.

accused of crime waives his privilege by voluntarily testifying, 897.

INDEX.

ABANDONMENT.

See LANDLORD AND TENANT, 1.

ABSTRACTS OF TITLE.

See SEARCHERS OF RECORDS.

ABUTTING.

See WATERS, 3.

ACCEPTANCE.

See DEEDS, 6.

ACCESSORIES AND ACCOMPLICES.

CRIMINAL LAW—PRINCIPAL AND ACCESSORY.—Under a statute abrogating the distinction between principal and accessory before the fact, a person may be found guilty under an indictment charging him as principal, although the evidence shows him to have been an accessory before the fact. *State v. Duncan*, 888.

ACCIDENT.

See HOMICIDE, 17; RAILROADS, 10, 21.

ACCOMPLICES.

See ACCESSORIES AND ACCOMPLICES.

ACCOUNTS.

JURISDICTION OF EQUITY.—Where the accounts to be examined and stated are on one side only, a court of equity will not assume jurisdiction of a bill for an accounting, unless the accounts are so complicated as to require the aid of equity to adjust them, or a discovery is prayed for and facts are alleged which show the necessity for such discovery. *Beggs v. Edison Electric etc. Co.*, 94.

See PAYMENT, 3; TRIAL, 1.

ACCRETIONS.

See WATERS, 6.

ACKNOWLEDGMENT.

See FORGERY, 4; LIMITATIONS OF ACTIONS, 4, 5.

ACQUITTAL.

See TRIAL, 10, 11.

ACTIONS.

See ASSIGNMENT; PLEADING, 1.

ADMIRALTY.

See JURISDICTION, 3, 4.

ADMISSIONS.

See TENDER, 1; VENDOR AND PURCHASER, 8.

ADVICE OF COUNSEL.

See MALICIOUS PROSECUTION, 3-5.

AFFIDAVITS.

See ATTACHMENT, 2.

AGENCY.

WHO ARE.—A banker holding himself out as dealing in choice stocks, and promising careful attention to his customers, occupies with such customers the relation of principal and agent. *Isham v Post*, 766.

See BANKS, 2; BROKERS; CORPORATIONS, 5-10; HUSBAND AND WIFE, 15; PAYMENT, 2; VENDOR AND PURCHASER, 6.

AGISTMENT.

See LIENS.

ALIMONY.

See MARRIAGE AND DIVORCE, 3, 4.

AMENDMENT.

See PLEADING, 6.

ANIMALS.

See REAL PROPERTY, 7; RAILROADS, 12, 13.

ANNULMENT.

See CORPORATIONS, 14-17.

APPEAL.

1. **RULING OF TRIAL COURT AS TO ADMISSIBILITY OF EVIDENCE, WHEN NOT REVIEWABLE.**—An appellate court will not review the ruling of the trial court in regard to the relevancy or competency of a newspaper article which was offered in evidence, but is not properly set out in its entirety upon the record. *Nelson v. Shelby Mfg. etc. Co.*, 116.
2. **LIBEL—ADMISSION OF IMMATERIAL EVIDENCE.**—In an action against a mercantile agency for a libelous publication as to the solvency of plaintiff, the introduction by the latter of evidence of his failure to collect accounts other than those set out in the petition for which special damages are claimed is not reversible error, as no substantial injury could have resulted to defendant therefrom. *Mitchell v. Bradstreet Co.*, 592.
3. **EVIDENCE ADMITTED WHICH MERELY SUPPORTS the averments in the answer cannot be assigned as error by the defendant.** *Mitchell v. Bradstreet Co.*, 592.

4. **CONFLICT OF EVIDENCE.**—Where a motion to discharge an attachment, on the ground that the allegations in the affidavits are not true, is decided on conflicting testimony, the ruling of the trial court will not be disturbed on appeal, unless the preponderance of evidence against it is clear and decisive. *Whipple v. Hill*, 742.
5. **TRIAL—CHARGE COVERING ONLY PART OF THE EVIDENCE, WHEN ERRONEOUS.**—A charge which ignores any material, conflicting, or qualifying evidence, or a material fact which is the legitimate inference of other proven facts, is misleading and erroneous. *Boyd v. Jones*, 100.
6. **PARTIES CANNOT COMPLAIN OF ERROR** which they invite or adopt. *Johnson-Brinkman Commission Co. v. Central Bank*, 615.
7. **CHARGE AUTHORIZING JURY TO DISREGARD MATERIAL EVIDENCE.**—Where there is some evidence tending to sustain an issue raised by one of the parties to a suit, it is reversible error to grant an instruction which is tantamount to a declaration that there is no evidence on such issue. *Nelson v. Shelby Mfg. etc. Co.*, 116.
8. **JURY TRIAL.**—THOUGH A COMMENT BY THE COURT DURING THE TRIAL OF A CRIMINAL CAUSE respecting the mode in which the attorney for the accused conducts his examination may be unnecessarily harsh, yet the judgment of conviction will not be reversed on that ground, if from the whole case it does not appear that the accused was injured thereby. *People v. Baker*, 276.
9. **OBJECTIONABLE STATEMENTS OF COUNSEL WILL NOT BE CONSIDERED ON, WHEN.**—An objection to the statements of counsel cannot be considered on appeal, unless they have been duly excepted to at the time they were made, and a motion made to exclude them. *Nelson v. Shelby Mfg. etc. Co.*, 116.
10. **INSTRUCTIONS.**—FAILURE TO GIVE instructions not asked is not error. *Mitchell v. Braulstreet Co.*, 592.
11. **VARIANCE.**—Even if plaintiff by his instructions places his right of recovery upon a different ground from that stated in the petition, yet the defendant cannot complain if he commits like error by submitting the converse of the theory hypothesized in plaintiff's instructions. *Johnson-Brinkman Commission Co. v. Central Bank*, 615.
12. **CRIMINAL LAW—CONTINUANCE—RIGHT OF ACCUSED TO BE PRESENT.**—The granting of a continuance in a criminal case in the absence of the accused is not error if his counsel is present, and it does not appear that the accused was subjected to any injustice. *State v. Duncan*, 888.
13. **HOMICIDE—INSTRUCTION AS TO REASONABLE DOUBT, ERROR IN REFUSING.** It is reversible error to refuse to instruct the jury, in a trial for homicide, that if they are not satisfied beyond a reasonable doubt that when the defendant did the act which caused the fatal wound he intended to kill the deceased, or that the act was one from which death or great bodily harm would ordinarily, or in the usual course of events, follow, they must acquit the defendant of manslaughter in the first degree. *Lewis v. State*, 75.
14. **APPEAL BONDS, SURETIES ON, NOT DISCHARGED BY SUBSTITUTION OF ANOTHER PLAINTIFF, WHEN.**—A surety on an appeal bond is not discharged by the fact that a person to whom the plaintiff's interest in the subject matter of the action has passed, while the appeal is pending, is substituted as a party plaintiff without the knowledge or consent of such surety, and allowed to prosecute the appeal in his own name. *Howell v. Alma Milling Co.*, 694.

- 15. APPEAL BOND, SURETIES ON, NOT DISCHARGED BY CONTINUANCES GRANTED BY AGREEMENT OF PARTIES.**—The fact that the various continuances of a case in the appellate court have been granted upon stipulations between the parties, without the consent of the surety on the appeal bond, will not, in the absence of proof of fraud, or of collusion between the principal and his creditor, operate to release such surety. *Howell v. Alma Milling Co.*, 694.
- 16. APPEAL BONDS, SURETIES ON, NOT DISCHARGED BY RENDITION OF JUDGMENT UPON STIPULATION.**—In the absence of proof of fraud, or of collusion between the appellant and respondent, a surety on an appeal bond is not discharged by the fact that judgment is finally rendered against his principal by agreement between the parties, without his knowledge or consent. *Howell v. Alma Milling Co.*, 694.
- See ERROR; JUDGMENTS, 17; NEW TRIAL; RAILROADS, 8.

APPLICATION.

See DEBTOR AND CREDITOR.

APPOINTMENT.

See OFFICERS, 3; RECEIVERS.

ARCHITECTS.

See MECHANICS' LIENS, 4.

ARREST.

See HOMICIDE, 6.

ASSETS.

See PARTNERSHIP, 5-7.

ASSIGNMENT.

ASSIGNMENT OF RIGHT OF ACTION.—A right of action to recover an interest in land out of which the true owner has been defrauded is transferable. *Connecticut etc. Ins. Co. v. Smith*, 656.

See BANKS, 8; INTERVENTION, 1; MORTGAGES, 2, 4-6.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

ASSIGNMENTS FOR BENEFIT OF CREDITORS, under the laws of Washington, vest the property in the assignee as an officer of the court, and prevent the enforcement of a mechanic's lien against the insolvent estate without leave of court, and all those having claims against such estate must present them in the insolvency proceeding. *Quincy v. Slipper*, 899.

See CREDITOR'S SUIT, 2; INSOLVENCY.

ATTACHMENT.

- 1. ATTACHMENT OF LAND WHICH IS SUBJECT TO A TRUST DEED TO SECURE THE PAYMENT OF INDEBTEDNESS** constitutes a lien upon funds remaining in the hands of the trustees after they have sold the land and from the proceeds of the sale satisfied such indebtedness. *Brown v. Campbell*, 314.
- 2. AFFIDAVIT FOR, NOT VITIATED BY CLERICAL ERROR, WHEN.**—Provided it appears from the whole contents of an affidavit on which an attach-

ment is granted, that the plaintiff's agent has duly sworn to the statement therein relating to the nature of the claim, the attachment will not be avoided for the reason that, owing to a mere clerical error, the language actually used fails to show that the requisite oath was taken. *Whipple v. Hill*, 742.

See APPEAL, 4; ESTOPPEL, 2; EXECUTION, 1; HOMESTEAD, 4; JUDGMENTS, 1; SUNDAY.

ATTORNEY AND CLIENT.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS, WHAT ARE NOT.

A conversation between a mortgagor and a mortgagee in the presence of the attorney employed to draft the mortgage is not a privileged communication, where the statements then overheard were not made for the purpose of obtaining professional advice, and have not served as the basis of any counsel given by the attorney. *Hanson v. Bean*, 516.

See JUDGMENTS, 19.

ATTORNEY'S FEE.

See CONFLICT OF LAWS, 1; MORTGAGES, 2.

AVOIDANCE.

See INFANTS.

BAILMENT.

NEGLECT, WHAT IS.—A MANDATARY WHOSE SITUATION OR EMPLOYMENT IMPLIES SKILL OR KNOWLEDGE adequate to the undertaking is always answerable for losses or injuries resulting from want of the exercise of such skill or knowledge. *Isham v. Post*, 766.

BANKRUPTCY.

See INSOLVENCY, 2.

BANKS.

1. **A BANKER ACTING WITHOUT COMPENSATION IN MAKING INVESTMENTS** for his customers is, nevertheless, under obligation to exercise such diligence as he has promised to those dealing with him, and such skill and knowledge as he has held himself out to possess. *Isham v. Post*, 766.
2. **BANKERS ACTING AS AGENTS—DEGREE OF CARE REQUIRED OF.—**A banker doing business in the city of New York, and advertising himself as dealing in choice stocks, and promising his customers careful attention in all their financial transactions, must exercise as to them a degree of care commensurate with the importance and risk of the business to be done and a skill and capacity adequate to its performance. That care and skill are such as should characterize a banker operating for others in a financial center, and differ in kind from the ordinary diligence and capacity of the ordinary citizen. *Isham v. Post*, 766.
3. **EVIDENCE TO SHOW DUE CARE.—**In an action against a banker for negligence in loaning moneys on raised certificates of stock it is error to exclude testimony that he loaned a large amount of his own money on similarly raised collaterals, and that for several years the same raised certificates had been given and received on the street as collaterals for loans, and deceived the skill and care of a great number of bankers and

brokers who took and held them without suspicion. Such evidence would have established the absolute good faith of the defendant in making the loan, and that he took as good care of his client's money as of his own, and that he was deceived by a forgery so perfect and skillful that it escaped for years the vigilance of the street. *Isham v. Post*, 766.

4. A BANKER IS NOT TO BE DEEMED NEGLIGENT because, before loaning moneys on certificates of stock, the official signatures to which were genuine, he did not present them for verification, if there was nothing on their face calculated to arouse suspicion, though they appeared on their face to have been issued six years before the loan was made. *Isham v. Post*, 766.
5. A BANKER IS NOT LIABLE FOR NEGLIGENCE BECAUSE HE OMITTED TO INQUIRE as to the solvency of persons to whom he loaned moneys of his customer upon apparently adequate security, if such persons were in good repute at the time of the loan, and there is nothing to indicate that inquiry would or could have developed any different information from that which the banker already had. *Isham v. Post*, 766.
6. A BANKER IS LIABLE FOR LOANING MONEYS OF HIS CUSTOMER on fraudulently raised certificates of stock, if a fair and reasonable examination of them would have disclosed the fraud to the skilled eye of an experienced banker, or awakened a suspicion which would have led to a verification. If, on the contrary, the forgery was such as to deceive any reasonable scrutiny of a fairly prudent banker knowing the signatures to be genuine, but not suspecting fraud in the body of the instrument, then the deception suffered would be excusable. *Isham v. Post*, 766.
7. EVIDENCE—BURDEN OF PROOF AS TO BANKER'S LIABILITY FOR LOSS.—Upon proof that plaintiff put into defendant's hands, as his banker and agent, moneys to be loaned upon demand, for interest, and in the mode provided by custom and usage, and that such moneys had not been returned, after proper demand, the defendant must assume the burden of proving that he did his duty faithfully and without negligence or misconduct, so that the resulting loss was not his, but must justly fall upon the plaintiff. *Isham v. Post*, 766.
8. NATIONAL BANKS HAVE AUTHORITY TO TAKE ASSIGNMENTS OF NOTES AND MORTGAGES upon real estate to secure payment of loans made to the mortgagees. *First Nat. Bank v. Andrews*, 885.

See AGENCY.

BEQUEST.

See CHARITIES, 2, 4-6; DEVISE, 2; HUSBAND AND WIFE, 2.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BILLS OF LADING.

See PAYMENTS, 5; SALES, 5.

BOARDERS.

See INNKEEPERS.

BONA FIDE PURCHASERS.

See FRAUDULENT CONVEYANCES, 7; VENDOR AND PURCHASER, 12.

BONDS.

BOND TO SECURE MORTGAGE AGAINST PARAMOUNT LIENS, CONSTRUCTION OF.—A bond conditioned that a mortgagor shall erect a building on the mortgaged land within a specified time, pay all claims for labor and materials which are or may become liens on the land or building, and keep the security the first and paramount lien on the premises, is to be construed as a mere general contract of indemnity against paramount liens, and not as an undertaking to be bound by the result of any actions brought against the mortgagee by parties claiming such liens, or to assume the defense of such actions in the absence of any request by the mortgagee to do so. *Pioneer Savings etc. Co. v. Bartch*, 511.

See **APPEAL**, 14-16; **INTERVENTION**, 2; **SURETYSHIP**; **TRUSTS**, 6; **VENDOR AND PURCHASER**, 17.

BOOKS.

See **EVIDENCE**, 1.

BOUNDARIES.

A MEANDER LINE IS NOT A BOUNDARY, the water whose body is meandered being the true boundary, whether the meander line actually coincides with the shore or not. *Lamprey v. State*, 541.

BROKERS.

1. **REAL ESTATE AGENTS—COMMISSIONS WHEN EARNED.**—A real estate broker performs his duty, and is entitled to his commission, when a purchaser is introduced who is ready, willing, and able to buy on the terms authorized by the principal, and no binding written contract of sale is required if the principal is in a situation to execute it himself. *Gelatt v. Ridge*, 683.
2. **REAL ESTATE AGENTS—WHEN ENTITLED TO COMMISSIONS.**—A real estate agent is entitled to his commissions if he is the procuring cause of negotiations which result in a sale, even though the negotiations are conducted and concluded by the principal in person. *Gelatt v. Ridge*, 683.
3. **REAL ESTATE AGENTS—COMMISSIONS WHEN EARNED.**—A real estate broker who produces a buyer who is ready, willing, and able to carry out the contract of sale as authorized by the principal, is entitled to his commissions, although such buyer is acting in behalf of another person. *Gelatt v. Ridge*, 683.
4. **REAL ESTATE AGENTS—COMMISSIONS—EVIDENCE.**—In an action by a real estate broker to recover commissions on a sale, a deed executed by the principal after suit is instituted is admissible to show a ratification of the broker's contract. *Gelatt v. Ridge*, 683.
5. **UNAUTHORIZED SALE, RATIFICATION OF.**—If a broker, after making a sale of stock purchased by him for his customer, which sale was unauthorized for lack of notice of the time and place thereof, sends the customer an account of the sale, crediting him with the price realized, and he thereupon promises to pay the balance remaining due to the broker as shown by such account, and makes no objection to the sale or the want of notice, this is a ratification of the act of the broker, and entitles him to recover the sum due him for advances to the customer. *Gillett v. Whiting*, 762.
6. **REAL ESTATE AGENTS—RATIFICATION OF CONTRACT OF—COMMISSIONS.**—Though a contract of sale made by a real estate agent varies from the

terms of his authority, yet, upon approval and ratification by the principal, as made by the agent, it becomes a part of the original contract, and the agent's commissions as fixed therein govern. *Gelatt v. Bridge*, 683.

7. **DAMAGES FOR UNAUTHORIZED SALE.**—If a broker sells stocks of his customer, without giving due notice of the sale, he does not thereby, as a matter of law, extinguish all claim against the customer for advances made, but the customer is entitled to be allowed as damages the difference between the price for which the stock was sold, and for which he received credit, and its market price then or within such reasonable time after a notice of sale as would have enabled him to replace the stock in case the market price exceeded the price realized. *Minor v. Beveridge*, 804.
8. **A BROKER DOES NOT, BY SELLING STOCKS WITHOUT GIVING DUE NOTICE OF THE SALE,** forfeit his right to recover advances made by him on their purchase. The unauthorized sale merely entitles the customer to recover damages sustained thereby, and for the purpose of diminishing such damages, or showing that no damages whatever were suffered, evidence is admissible to prove that the stocks might have been repurchased in the open market, within the next fifteen days after the sale, below the price realized thereat. *Minor v. Beveridge*, 804.
9. **BROKER'S COMMISSION—STATUTE OF FRAUDS.**—A broker is entitled to his commission on a sale made by him for an owner of real property, though the purchaser never enters into any enforceable contract of sale, if, as a matter of fact, he was willing to comply with his oral contract, which was void by the statute of frauds, and his compliance was prevented by the refusal of the owner to receive the purchase price and make a conveyance of the property. *Holden v. Starks*, 451.

See EVIDENCE, 1; TRIAL, 1.

BURDEN OF PROOF.

See BAYES, 7; FRAUDULENT CONVEYANCES, 7; HOMICIDE, 16; MALICIOUS PROSECUTION, 1, 4; PARTNERSHIP, 1; POSTOFFICES, 2; RAILROADS, 10, 21.

BY-LAWS.

See CORPORATIONS, 3, 6.

CARRIERS.

1. **FREIGHT, WHO ANSWERABLE FOR.**—When a vendor of goods delivers them to a railway corporation to be carried to the purchaser, although the title passes by such delivery, and the name and address of the consignee, who is also the purchaser, is known to the corporation, the vendor is presumed to make the contract for the transportation and to be liable for the payment of the freight. But this presumption may be rebutted, and if the vendee has ordered the goods to be consigned at his risk and on his account, and the freight charges are made to him and bills for freight sent to him, these facts are evidence proper for the consideration of the jury, who must be left to determine as a matter of fact whether the contract for transportation was made with the vendor or the vendee and to impose liability accordingly. *Union Freight R. R. Co. v. Winkley*, 898.
2. **EXACTING CONTRACTS LIMITING LIABILITY.**—If a common carrier furnishes its agent bills of lading, uniform in terms and containing stipe-

lations limiting its liability for loss to losses occasioned by its negligence, and would not have received property for shipment except under such bills and stipulations, a shipper, though he did not expressly object to such bills, is not deemed to have assented thereto. Under the circumstances, because he had no choice except to ship his property under the terms offered by the carrier, the stipulation of exception from liability must be regarded as unfairly obtained and therefore as inoperative. *Railway Co. v. Cravens*, 230.

2. **CONTRACTS LIMITING LIABILITY OF.**—It would violate the policy of the law to permit contracts to be made restricting the carrier's common-law liability where he does not afford shippers an opportunity to contract for the service without restriction. *Railway Co. v. Cravens*, 230.

See NEGLIGENCE, 2; POSTOFFICES, 2; RAILROADS, 9-11; SALES, 1-2.

CERTIFICATE OF STOCK.

See HUSBAND AND WIFE, 2.

CHALLENGE.

See TRIAL, 6, 7.

CHARACTER.

See HOMICIDE, 9, 10.

CHARITIES.

1. **GIFTS TO CHARITABLE USES ARE HIGHLY FAVORED** and liberally construed to accomplish the intent of the donor. Trusts for such purposes may be established and carried into effect, when, if not of a charitable nature, they could not be supported. *Woodruff v. Marsh*, 346.
2. **WILLS—CONSTRUCTION.**—If two modes of construction are fairly open, one of which turns a charitable bequest in a will into an illegal perpetuity, while the other makes it valid and operative, the latter construction must be adopted. *Woodruff v. Marsh*, 346.
3. **WILLS—CONSTRUCTION.**—In considering the proper constructions of provisions of a will creating a charitable trust, it is allowable to transpose words or limitations, when warranted by the immediate context or general scheme of the will. *Woodruff v. Marsh*, 346.
4. **WILLS—CONSTRUCTION.**—When two valid charitable trusts are created by will, and the testator bequeathes to the trustees of each the sum of four hundred thousand dollars for the establishment and maintenance of such trusts, a further provision in the will relating to such bequests that "the said four hundred thousand dollars to be kept safely invested, and from the yearly income thereof the sum of ten thousand dollars shall each year be added to the principal of said fund for the period of one hundred years, and longer if the trustees deem it best," is reasonable and valid. Should the trustees continue the accumulations after a hundred years for an unreasonable time, the courts can interpose a proper remedy. *Woodruff v. Marsh*, 346.
5. **CONSTRUCTION—CHARITABLE BEQUEST.**—A will in which the testator, after expressing a desire that a large part of his estate shall be "used in the improvement of mankind by affording such assistance and means of educating the young as will help them to become good citizens," gives to sixteen trustees a tract of land, with four hundred thou-

sand dollars in trust for the purpose of maintaining a home for destitute and friendless children on the premises, "to be known as the William L. Gilbert Home, to be under the care and control of the above-named trustees," who shall have power to fill all vacancies, states the charitable purpose for which the bequest is given with sufficient definiteness, and sufficiently describes the class to be benefited. The "care and control" given to the trustees is not limited to the fund, but includes the institution, and the power to select the individuals who are to receive the benefit. The "assistance" to be given to "destitute and friendless" children under the bequest is to supply them with what other children, not destitute and friendless, find at their homes, and includes food, shelter, clothing, and medical attendance. The "education" referred to may be afforded either by instruction given at the "Home," or by allowing some, or all, of the children to attend school in the vicinity, at the discretion of the trustees. *Woodruff v. Marsh*, 346.

6. CONSTRUCTION OF CHARITABLE BEQUEST.—A bequest in a will, by which a testator leaves his residuary estate to trustees "in trust for the establishment and maintenance of an institution of learning, to be known as the Gilbert School," provided certain lands and buildings shall be "given free of cost for the location of said school, excepting that the present owners of said land may reserve the use and income from the hotel building and barn located thereon for the period of twenty years from the date of their purchase of said land," is not obnoxious to the statute against perpetuities, as it clearly appears that it was the intent of the testator that the site for the school should be conveyed to the trustees within twenty years from such purchase, and the conveyance of such site is not a condition precedent to the taking effect of the bequest, as in equity it vests at once upon the death of the testator in the class of beneficiaries, who are ultimately to profit by it, liable to be divested by the subsequent failure to acquire the site within such twenty years. *Woodruff v. Marsh*, 346.

CHARTERS.

See CORPORATIONS, 14-17, 19.

CHATTEL MORTGAGES.

PRIORITIES BETWEEN—MORTGAGEE IN GOOD FAITH, WHO IS.—A subsequent mortgagee cannot obtain priority for his lien over an earlier unrecorded mortgage, unless he shows that he is a mortgagee in good faith, a term which, in such cases, means "without notice" as well as "for a valuable consideration"; but good faith is *prima facie* made out by proof that the second mortgage was taken for a valuable consideration and in the ordinary course of business. *Wright v. Larson*, 504.

See MORTGAGES.

CHATTELS.

See PERSONAL PROPERTY; SALES.

CHECKS.

See PAYMENT, 1, 5.

CHOSES IN ACTION.

See HUSBAND AND WIFE, 10.

CITIES.

See MUNICIPAL CORPORATIONS.

CLOUD ON TITLE.

SUIT TO REMOVE a cloud from the title to land may be maintained by the owner of the equitable title, although the land is in the possession of another, when the object of such suit is to divest title and declare a trust. *Connecticut etc. Ins. Co. v. Smith*, 656.

See INJUNCTION, 2.

COLLATERAL ATTACK.

See CORPORATIONS, 11; EMINENT DOMAIN, 1, 2; JUDGMENTS, 3; JURISDICTION OF THE PEACE.

COLLECTION.

See INTEREST, 2.

COLLISIONS.

See RAILROADS, 18.

COMMERCE.

See INTERSTATE COMMERCE; JURISDICTION, 4.

COMMISSIONERS.

See PARTITION, 4, 5.

COMMISSIONS.

See BROKERS, 1-4, 6, 9.

COMMON CARRIERS.

See CARRIERS.

COMMON LAW.

See EVIDENCE, 12.

COMPULSION.

See CRIMINAL LAW, 1; HOMICIDE, 7.

CONCURRENT.

See JURISDICTION, 7.

CONDITIONS.

See CHARITIES, 6; DEEDS, 7-9; TENDER.

CONFESSIONS.

See EVIDENCE, 8.

CONFLICT OF LAWS.

1. LAW FORI—STIPULATION IN MORTGAGE FOR PAYMENT OF ATTORNEY'S FEE, GOVERNED BY.—A stipulation in a mortgage for the payment of an attorney's fee, in the event of the bringing of a suit to foreclose the lien,

cannot be enforced if it is invalid by the law of the state where the remedy on the contract is sought, although both the mortgage and a note which it secures contain a clause expressly providing that "they are made and executed under and are in all aspects to be construed by the laws" of another state where such a stipulation is binding. *Security Co. v. Eyer*, 735.

- 2. RECOVERY FOR INJURY RECEIVED IN ONE STATE RESULTING IN DEATH IN ANOTHER.**—If a person injured in one state dies of such injury in another state, his personal representative cannot maintain an action to recover therefor in the latter state unless a negligent act or omission suffered there is directly responsible for, and the proximate cause of, the injury sustained in the former state. *Derr v. Lehigh Valley R. R. Co.*, 848.

See **CONTRACTS**, 1-3; **CORPORATIONS**, 4, 21-23; **INJUNCTIONS**, 1; **INSOLVENCY**; **NEGLIGENCE**, 6-8; **PUBLIC LANDS**, 1; **USURY**, 1.

CONGRESS.

See **INTERSTATE COMMERCE**, 1; **JURISDICTION**, 3-5.

CONSIDERATION.

See **CONTRACTS**, 4-6; **FRAUDULENT CONVEYANCES**, 6.

CONSOLIDATION.

See **MANUFACTURING CORPORATIONS**.

CONSTITUTIONAL LAW.

See **CONSTITUTIONS**; **PUNISHMENTS**; **STATUTES**; **VAGRANCY**.

CONSTITUTIONS.

CONSTITUTIONAL LAW—URGENCY, SEVERAL CASES OF, MAY BE CONSIDERED TOGETHER.—If a constitution declares that a bill shall be read on three several days before being placed in its final passage, unless in a case of urgency, two-thirds of the house where such bill may be pending, by a vote of ayes and nays, dispenses with this provision, the house may exercise this dispensing power with respect to two or more bills at the same time, and by one declaration of its purpose; nor does the fact that several of the members of the house voting to declare a bill a case of urgency, voted against it on its final passage, deprive the vote of urgency of its force, or impair the validity of the bill. *People v. County of Glenn*, 305.

See **TAXES**; **TRIAL**, 5; **WITNESSES**, 2.

CONSTRUCTION.

See **CHARITIES**, 2-6; **DEVISE**, 1; **USURY**, 2; **WILLS**, 1, 2.

CONTINUANCE.

See **APPEAL**, 12; **JUDGMENTS**, 4.

CONTRACTORS.

See **MUNICIPAL CORPORATIONS**, 5; **WATERS**, 5.

CONTRACTS.

1. **CONFLICT OF LAWS.**—The law of the place where the contract is made is a part thereof, and determines the measure of right it secures subject to the limitation that no state enforces contracts entered into in another state or country, if such enforcement involves a breach of legal or moral right as maintained in the law of the forum. *Falls v. United States Sav. etc. Co.*, 194.
2. **CONFLICT OF LAWS—CONSTRUCTION OF CONTRACT.**—Though a mortgage given by a citizen of Alabama to secure a loan in a foreign loan association stipulates that it is made under and with reference to the laws of the state where such association was created, yet if the loan was negotiated and the mortgage executed in Alabama, it is an Alabama contract governed by the law of that state. *Falls v. United States Sav. etc. Co.*, 194.
3. **LEX LOCI.**—The question whether the giving of a promissory note for an antecedent debt operates as a payment and extinguishment thereof is one which goes to the force and effect of the contract itself, and must therefore be determined by the law of the state where the contract was entered into. *Thomson - Houston Electric Co. v. Palmer*, 536.
4. **WILLS—PAROL AGREEMENT TO MAKE—BREACH OF—DAMAGES FOR SERVICES.**—When services are rendered by one person to another in pursuance of a parol mutual understanding and agreement between them, that compensation for them should be made by will, and the party receiving such services dies without making the expected compensation, the party rendering the services is entitled to compensation out of the estate of the deceased as a creditor for the value of such services. *Grant v. Grant*, 379.
5. **WILLS—PAROL AGREEMENT TO MAKE—BREACH OF—DAMAGES FOR SERVICES.**—If services have been performed under a parol contract in consideration of property to be conveyed by will, and a breach of the contract cannot be enforced by reason of the statute of frauds an action will lie against the personal representative of the decedent, on a *quantum meruit*, to recover the value of such services. In such case the value of the services performed, and not the value of the property agreed to be conveyed, is the measure of damages, and before the plaintiff can maintain his action he must allege and prove, that prior thereto he had presented his claim against the estate and to the personal representative of the decedent. *Grant v. Grant*, 379.
6. **WILLS—PAROL AGREEMENT TO MAKE—SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—PART PERFORMANCE.**—A parol agreement which expressly calls for succession by will to both real and personal property, and which is made in consideration of a child becoming the member of a family, is entire and within the statute of frauds and cannot be specifically enforced in equity upon the death of the promisor without performance on his part; nor will the fact that such child has performed its part of the contract constitute such part performance as to relieve the case from the operation of such statute. *Grant v. Grant*, 379.
7. **STATUTE OF FRAUDS—SPECIFIC PERFORMANCE OF PAROL CONTRACT.**—ACTS OF PART PERFORMANCE are sufficient to take a parol contract out of the operation of the statute of frauds if they are such as clearly refer to some contract in relation to the subject matter in dispute, the terms of which may then be established by parol. *Grant v. Grant*, 379.

6. **MONEY PAID UPON A CONTRACT VOID UNDER THE STATUTE OF FRAUDS** MAY BE RECOVERED as money had and received for the use of the purchaser, and a previous demand is not necessary. *Nelson v. Shelby Mfg. etc. Co.*, 116.
9. **STATUTE OF FRAUDS—AGREEMENT FOR SALE OF LANDS.**—A letter from a general land agent of a railroad company to a settler upon its lands, assuring him that if he is the first settler thereon, continues to reside upon and improve such land until it shall be offered for sale, he will be entitled to the first privilege of purchase at an appraised valuation to be fixed without reference to the improvements, does not constitute a valid contract for the conveyance of the land which can be specifically enforced, although the condition as to settlement and improvement has been fully complied with. *Lombard Investment Co. v. Carter*, 861.
10. **CONTRACTS, WHEN BINDING AFTER DEATH OF THE CONTRACTOR.**—A contract made to induce the organization of a water company, agreeing to take a specified amount of water per annum for ten years and to pay therefor a price designated in the contract, continues obligatory after the death of the contractor, and renders his estate liable for the price of the water to be taken by him during the years contemplated by the contract. *Drummond v. Crane*, 460.
- See CARRIERS; DAMAGES, 1, 2; FORGERY, 2; HUSBAND AND WIFE, 16; INFANTS; INTERVENTION, 1; MECHANICS' LIENS, 5; PARTNERSHIP, 1; PAYMENT, 1; PHYSICIANS AND SURGEONS, 3, 4; SALES; USURY; VENDOR AND PURCHASER.

CONTRIBUTORY NEGLIGENCE

See NEGLIGENCE, 9, 10.

CONVERSION.

See ESTOPPEL, 2; JUDGMENTS, 7; PLEADING, 2; TROVER.

CONVEYANCES.

See CORPORATIONS, 11, 12; FRAUDULENT CONVEYANCES; HOMESTEAD, 5-7.

CORPORATIONS.

1. **CORPORATION DE FACTO, WHEN CONSTITUTED.**—To give a body of men the status of a *de facto* corporation, there must have been an apparent attempt on their part to perfect a corporate organization under statutory authority, and a user of corporate powers pursuant to such attempted organization. If these conditions are satisfied, it is not necessary that there should have been a full, or even a substantial, compliance with the provisions of the law. *Finnegan v. Noerenberg*, 552.
2. **CORPORATION DE FACTO, INFORMALITY NOT PREVENTING BODY FROM BECOMING.**—The omission to state distinctly in the articles filed by a body of men assuming to form a corporation, the place where its business is to be carried on will not prevent such body from acquiring the rights of a corporation *de facto*. *Finnegan v. Noerenberg*, 552.
3. **CORPORATIONS DE FACTO.**—A SUFFICIENT USER OF CORPORATE RIGHTS to impart the character of a corporation *de facto* to a body of men who have attempted to organize under the law is shown by the collection of subscriptions to the capital stock of the association, the election of officers, the adoption of by-laws, the purchase of a lot, the erection of a

building thereon, and the demise of portions of that building to various tenants. *Finnegan v. Noerenberg*, 552.

4. **CONFLICT OF LAWS.—ACT OF BECOMING STOCKHOLDER IN FOREIGN CORPORATION** is deemed as done in the state where the corporation was created and has its domicile, and the amount chargeable as a membership fee is governed by the laws of that state. *Falls v. United States Sav. etc. Co.*, 194.
5. **A NOTE SIGNED BY AN AGENT OF A CORPORATION** authorized generally to give notes on its behalf is enforceable by a *bona fide* holder thereof, though the officer or agent exceeded his authority in executing the note in question. *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 453.
6. **THE AUTHORITY OF AN OFFICER TO SIGN NOTES** on behalf of a corporation need not appear in the by-laws, nor be expressly given by a vote of the trustees or stockholders. *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 453.
7. **NEGOTIABLE NOTES—AUTHORITY TO EXECUTE.**—If a corporation permits its treasurer to act as its fiscal agent, and holds him out to the public as having the general authority implied from his official name and character, and by its silence and acquiescence suffers him to draw drafts, and to indorse notes payable to the corporation, it is bound by his acts within the scope of such implied authority. *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 453.
8. **PRESUMED AUTHORITY.**—**TREASURERS** of manufacturing and trading corporations are clothed by virtue of their office with power to act for the corporation in making, accepting, indorsing, issuing, and negotiating promissory notes and bills of exchange, and such a negotiable instrument in the hands of an innocent purchaser for value, who has taken it without notice of any want of authority on the part of the treasurer, is binding on the corporation, although with reference to the corporation it is accommodation paper. *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 453.
9. **NEGOTIABLE INSTRUMENTS.—THE TREASURER OF A GAS-LIGHTING CORPORATION IS PRESUMED TO HAVE AUTHORITY** by virtue of his office to execute negotiable promissory notes which will bind the corporation. It is to be regarded as a manufacturing corporation, and its treasurer as invested with the same powers as treasurers of other manufacturing corporations. *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 453.
10. **A CORPORATION IS ESTOPPED TO DENY** that the person executing a negotiable instrument as its treasurer was such treasurer, and that his acts within the implied power of his office are binding upon it, when he took possession of the office under a pretended election, and was permitted, without objection on the part of the corporation, or any of its stockholders, to continue in discharge of the duties of the office, and his election was ultimately ratified by the corporation and its stockholders after the execution of the note in question. *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 453.
11. **CONVEYANCES TO, COLLATERAL ATTACK.**—The capacity of a corporation to take a conveyance of land, after the transfer has reached completion, can be collaterally attacked by the state only, and not by a private party. *Connecticut etc. Ins. Co. v. Smith*, 656.
12. **CONVEYANCES TO—PRESUMPTION.**—A proper and legitimate purpose is presumed on the part of a corporation in accepting a conveyance to land. *Connecticut etc. Ins. Co. v. Smith*, 656.

12. **CREATION OF FRAUD.**—Any attempt to acquire corporate life and functions by a pretentious or evasive compliance with the statute, as to issue of, or payment for, stock, no matter what the papers of the corporation say upon their face, must be adjudged abortive as a fraud upon the law. The conditions to organization prescribed by the statute are prerequisite to a rightful or lawful corporate organization, and it is only when these things are done that the subscribers become a body corporate. *State v. Webb*, 151.
14. **ACTION TO ANNUL THE CHARTER** of a private corporation may be brought in the name of the state, under the Alabama statute, on the information of any person giving security for costs, without first obtaining an order from any court. *State v. Webb*, 151.
15. **ACTION TO ANNUL CHARTER—PARTIES—SUFFICIENCY OF INFORMATION.**—An information in an action to annul the charter of a private corporation, which names certain stockholders who compose its governing body, and who fairly represent the other stockholders, who the information alleges are too numerous to be brought upon the record, that some are unknown and the remainder nonresidents, is not open to demurrer on the ground that all of the stockholders are not made parties. *State v. Webb*, 151.
16. **ACTION TO ANNUL CHARTER—PARTIES.**—An information in an action to annul the charter of a private corporation, alleging that certain stockholders named, who compose its governing body, together with their associates, are usurping the powers of a corporation, makes the stockholders specially named the only parties defendant, and is not subject to demurrer on the ground that it seeks to make other stockholders parties defendant, by describing them as associates, without naming or otherwise designating them. *State v. Webb*, 151.
17. **ACTION TO ANNUL CHARTER—WAIVER OF RIGHT.**—If allegations in an information brought by a private person in the name of the state to annul the charter of a private corporation, charging fraudulent preliminary steps in its organization, and the concealment of such fraud by its stockholders from the state, are true, such stockholders can acquire no advantage from such fraud, and they cannot successfully claim, on demurrer to the information, that the state has waived its right to proceed against them, nor that by its failure to proceed against them it has admitted or acquiesced in their corporate existence. *State v. Webb*, 151.
18. **ACTION TO RESTRAIN INDIVIDUALS FROM ACTING AS CORPORATION—PARTIES.**—An action against individual stockholders to restrain them from fraudulently usurping the powers of a corporation is properly brought against them individually, and the corporation, whether *de jure* or *de facto*, is not a proper nor necessary party defendant. *State v. Webb*, 151.
19. **PROOF OF INCORPORATION.**—In an action by a foreign corporation to foreclose a mortgage showing on its face that the plaintiff is a corporation, proof of its incorporation is dispensed with, and error in receiving in evidence a defective copy of its charter of incorporation is immaterial. *Falls v. United States Sav. etc. Co.*, 194.
20. **ESTOPPEL TO DENY EXISTENCE OF.**—In an action by a foreign corporation to foreclose a mortgage showing on its face that it is payable to a corporation, the mortgagor is estopped from denying the corporate capacity of the mortgagee. *Falls v. United States Sav. etc. Co.*, 194.

21. **FOREIGN CORPORATIONS—CONFLICT OF LAWS.**—A corporation which performs corporate acts in a state other than its domicile, and seeks to enforce rights there, can exercise no exceptional rights and privileges which are conferred by the law of its creation if such enforcement involves a breach of the public policy or statutory system of the state where such rights are sought to be enforced. One state cannot confer rights and authorize their exercise beyond its own boundaries, unless they are in harmony with the general policy of the state in which the exercise is attempted. *Falls v. United States Sav. etc. Co.*, 194.
22. **FOREIGN CORPORATIONS—CONFLICT OF LAWS.**—The power of a corporation to act in a foreign country or another state depends upon the law of the country of its creation, and on the law of the place where it assumes to act. It has only such powers as were given to it by the authority which created it, and it cannot do any act by virtue of those powers in any country or state where the laws forbid it so to act. *Falls v. United States Sav. etc. Co.*, 194.
23. **CONFLICT OF LAWS—USURY.**—Though a corporation is expressly authorized by its charter to charge a certain rate of interest upon its loans, it is not permitted to charge the same rate in a foreign state, if that is contrary to the usury laws there in force. *Falls v. United States Sav. etc. Co.*, 194.

See **INTERSTATE COMMERCE; MANUFACTURING CORPORATIONS; RECEIVERS, 2; STATUTES, 2; USURY, 1.**

COSTS.

See **JOINT LIABILITY, 4.**

COTENANCY.

See **HOMESTEAD, 1; PARTITION; PARTNERSHIP, 2, 3.**

COUNSEL.

See **MUNICIPAL CORPORATIONS, 2, 3; TRIAL, 8.**

COUNTIES.

See **OFFICERS, 1; STATUTES, 7; TAXES.**

COURTS.

See **JURISDICTION.**

COVENANTS.

See **DEEDS, 8, 9; VENDOR AND PURCHASER, 14, 17.**

CREDITOR'S SUIT.

1. **ALLEGATIONS OF FRAUD.**—A mere general averment of fraud is not sufficient in a bill by which a creditor seeks to restrain a threatened disposition of a debtor's property. The conduct and facts from which the conclusion of fraud is deduced must be set out with such particularity that issue may be joined on the allegations. *Fort Payne Furnace Co. v. Fort Payne Coal etc. Co.*, 109.
2. **A CREDITOR'S BILL TO REACH THE INCOME OF A TRUST FUND** may be sustained by an execution creditor or an assignee in insolvency of the beneficiary, where a sum has been bequeathed to the trustee upon a trust to

pay the income over to such beneficiary during the term of his natural life, although such trustee is also given authority, in addition to the income, to pay over any part of the principal when he shall regard such payment as wise and expedient, and demanded by the necessities of the beneficiaries. *Evans v. Wall*, 406.

CRIMINAL LAW.

1. **CRIME UNDER COMPELSION.**—No man can excuse himself under the plea of necessity or compulsion for taking the life of an innocent person. *Arg v. State*, 137.
 2. **THE SAME ACT MAY BE AN OFFENSE BOTH AGAINST THE STATE AND THE UNITED STATES**, and punishable in each jurisdiction under its laws. *People v. Welch*, 793.
 3. **CRIMINAL EVIDENCE—MARKS OR FOOTPRINTS.**—Any traces or marks found at or near the scene of a crime about the time of its commission, indicative of the presence or proximity of the accused, are admissible in evidence as facts tending to connect him with its commission. The character of footprints found where the crime is discovered, leading to or from the place of the crime, and their correspondence with the feet of the accused, or with shoes worn by or found in his possession, are also admissible in evidence to identify him as the guilty party. *Hodge v. State*, 145.
- See ACCESSORIES AND ACCOMPLICES; APPEAL, 12, 13; DEFINITIONS; FORGERY; HOMICIDE; INFORMATION; LARCENY; STATES; TRIAL, 6-11; VAGRANCY; WITNESSES, 1, 2, 5, 6.

CROSS-EXAMINATION.

See WITNESSES, 1, 2.

CROSSINGS.

See RAILROADS, 3-7.

CRUELTY.

See MARRIAGE AND DIVORCE, 2.

CUSTODY.

See PARENT AND CHILD, 1-3.

CUSTOM.

See BANKS, 7; RAILROADS, 22.

DAMAGES.

1. **MENTAL SUFFERING UNCONNECTED WITH ANY PHYSICAL INJURY** is not sufficient to sustain an action for damages for breach of contract. *Connell v. Western Union Tel. Co.*, 575.
2. **THE MEASURE OF DAMAGES FOR THE REFUSAL OF A DEGRADED CONTRACTOR** to take water of a specified value for a term of years is not necessarily the amount agreed to be paid for such water, though the cost of delivering it is nothing. There should be deducted from the amount agreed to be paid such sums as the water company has received from the use of the water on the premises on which its use was contem-

plated at the making of the contract, though such premises no longer belong to such contractor nor to his estate. *Drummond v. Crans*, 460.

See BROKERS, 7, 8; CONTRACTS, 5; DEEDS, 8; EMINENT DOMAIN, 3; LIBEL, 3, 6-8; MASTER AND SERVANT, 10-12; MUNICIPAL CORPORATIONS; RAILROADS, 2; TELEGRAPH COMPANIES; VENDOR AND PURCHASER, 5.

DEATH.

See CONTRACTS, 10.

DEBTOR AND CREDITOR.

APPLICATION OF PAYMENTS BETWEEN MORTGAGOR AND MORTGAGEE.—A mortgagee, in the absence of an agreement with the mortgagor, is bound to apply moneys realized from the sales of property covered by the mortgage to the mortgage debt. The burden of proving that the mortgagor consented that such moneys should be applied to any other debt rests upon the mortgagee. *Boyd v. Jones*, 100.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS; CREDITOR'S SUIT; EVIDENCE, 5; EXECUTION; FRAUDULENT CONVEYANCES; HUSBAND AND WIFE, 13-15, 22; INJUNCTIONS; PARENT AND CHILD, 4, 5.

DECLARATIONS.

See EVIDENCE, 9, 10.

DEEDS.

1. **DELIVERY.**—A deed delivered by the grantor to a third person to be delivered to the grantee, and by such third person delivered to the grantee, constitutes a good delivery, though the grantor was dead at the date of the last delivery. The delivery becomes operative by relation as of the date when first made to such third person, if an intent to that effect is manifested by acts or words, or by both. *White v. Pollock*, 671.
2. **DELIVERY.**—A deed from a father to his son, delivered by the father to his wife and accepted by her in the presence of the son, and with his consent, accompanied by words showing a present intent to deliver, constitutes a good delivery, although the deed is not delivered by the wife to the son until after the grantor's death. *White v. Pollock*, 671.
3. **A DEED IS NOT DELIVERED** though it is executed in the presence of a witness, if there is no declaration on the part of the grantor that he intends it to take effect at once, and he retains it in his possession during his lifetime, putting it in a chest and bequeathing the chest to the grantee. *Parrott v. Avery*, 465.
4. **DELIVERY—ACCEPTANCE.**—The payment of a debt by the execution and delivery of a deed requires the assent of the grantee, and until such assent is given no title is transferred. *Cravens v. Rossiter*, 606.
5. **DELIVERY** of a deed to a recorder for registry is not a delivery to the grantee. *Cravens v. Rossiter*, 606.
6. **REGISTRY AS DELIVERY—RATIFICATION—INTERVENING LIEN.**—Registry of a deed by the grantor, without the grantee's knowledge or consent, does not of itself constitute a delivery. The subsequent ratification and acceptance of the deed by the grantee does not relate back so as to cut out an intervening judgment lien. *Cravens v. Rossiter*, 606.

7. **FORFEITURE FOR CONDITION BROKEN—RE-ENTRY.**—A grantor or his grantee can maintain ejectment against the grantee or his grantees, for a breach of an express condition of forfeiture in a deed, without re-entry upon the land, or an express reservation of a right of entry in the deed. *Ruddick v. St. Louis etc. Ry. Co.*, 570.
8. **FORFEITURE FOR CONDITION BROKEN—REMEDY—MEASURE OF DAMAGES.**—If a railroad company has entered under a deed of a right of way containing a covenant to furnish the grantor with an annual pass, coupled with a condition that a failure to furnish such pass shall work a forfeiture of the land, a subsequent breach of the condition will not sustain an action by the grantor for damages for the taking of the land for a right of way, and for injuries to his whole tract. His remedy is either an action for damages for failure to furnish such pass, or ejectment for forfeiture on condition broken, in which latter action he is entitled to rent for the use of the roadbed from the time of such breach. *Ruddick v. St. Louis etc. Ry. Co.*, 570.
9. **FORFEITURE—CONDITION SUBSEQUENT.**—A successor to a grantee in a deed to a railway for a right of way, containing a covenant to furnish the grantor with an annual pass, coupled with a condition that a failure to do so shall work a forfeiture of the land, takes subject to such condition. *Ruddick v. St. Louis etc. Ry. Co.*, 570.

See HUSBAND AND WIFE, 6; JUDGMENTS, 2.

DE FACTO.

See CORPORATIONS, 1-3; OFFICERS, 4.

DEFAULT.

See JUDGMENTS, 3, 4, 13; MORTGAGES, 11.

DEFINITIONS.

- "Assistance." *Woodruff v. Marsh*, 346.
 "Care and Control." *Woodruff v. Marsh*, 346.
 "Education." *Woodruff v. Marsh*, 346.
 In Good Faith. *Wright v. Larson*, 504.
 "Laborer." *Henderson v. Nott*, 720.
 Marketable Title. *Herman v. Somers*, 851.
 Party Wall. *Normille v. Gill*, 441.
 Proximate Cause. *Western Ry. v. Mutch*, 179.
 Reasonable doubt is doubt for which a good reason arising from the evidence can be given. *Hodge v. State*, 145.
 Self-defense. *Springfield v. State*, 85.
 Watercourse. *Chamberlain v. Hemingway*, 330.

DE JURE.

See OFFICERS, 4.

DELIVERY.

See CARRIERS, 1; DEEDS, 1.

DEMURRER.

See JUDGMENTS, 18; PLEADING, 8.

DE SON TORT.

See TRUSTS, 2.

DEVIATION.

See MASTER AND SERVANT, 6-9.

DEVISE.

1. WILLS—CONSTRUCTION OF DEVISE—LIFE ESTATE OR FEE.—A testamentary devise as follows: "to my beloved wife I allow the use as she may deem best the residue of my estate for her own advantage, and at her death, if any of it remain, to be equally divided between my three children," followed by a provision in the will that the residuary real estate devised to the wife is subject to sale for the payment of the testator's debts, if that should be necessary, in preference to the sale of real estate devised to one of the children, vests in the testator's widow only a life estate in the residuary realty devised to her. *Taylor v. Bell*, 857.

2 WILLS.—A DEVISE OF LAND CANNOT RESULT FROM A BEQUEST OF A CHEST AND ITS CONTENTS, though a part of such contents is an undelivered conveyance from the testator to the legatee. *Parrott v. Avery*, 465.

See HUSBAND AND WIFE, 1.

DIRECTING VERDICT.

See LIBEL, 8; TRIAL, 5.

DISCHARGE.

See MASTER AND SERVANT, 10-12; TRIAL, 10, 11.

DISCOVERY.

See ACCOUNTS.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOWER.

See HOMESTEAD, 6; WILLS, 2.

DRAINS.

See WATERS, 4.

DRUGS.

See TRADEMARKS.

EARNINGS.

See PARENT AND CHILD, 4, 5.

EASEMENTS.

See HIGHWAYS.

EJECTMENT.

See DEEDS, 7, 8; MORTGAGES, 7; TRUSTS, 10; VENDOR AND PURCHASER, 16.

ELECTION.

See ESTOPPEL, 2; JOINT LIABILITY, 1, 2; LANDLORD AND TENANT, 2;
VENDOR AND PURCHASER, 1.

ELECTRIC COMPANIES.

See MANUFACTURING CORPORATIONS.

EMINENT DOMAIN.

1. CONDEMNATION PROCEEDINGS—COLLATERAL ATTACK.—Proceedings of a judicial nature to acquire land for a public use, when collaterally attacked, are to be viewed and construed with the benefit of the same presumptions of validity and regularity ascribed by law to other proceedings before the same courts or officers. *Leonard v. Sparks*, 646.
2. CONDEMNATION PROCEEDINGS—COLLATERAL ATTACK.—Although the record and judgment in proceedings to open a street do not affirmatively show that the jury was composed of "disinterested freeholders," as required by law, yet such proceedings are presumed to be regular, and the judgment cannot be collaterally attacked. *Leonard v. Sparks*, 646.
3. ASSESSMENT OF DAMAGES UPON ENTIRE TRACT.—A landowner is entitled to have his compensation assessed for the injury to the entire tract of which the land appropriated by proceedings in eminent domain forms a part. Mere artificial or nominal lines of division are not material where the several lots or parcels are contiguous, and are held and used for a common purpose, so that they may properly be treated as an entirety for the assessment of the compensation. *Kramer v. Chicago etc. Ry. Co.*, 483.

See RAILROADS, 1-8.

ENTIRETIES.

See HUSBAND AND WIFE, 1-4.

ENTRY.

See PLEADING, 5.

EQUITY.

See ACCOUNTS; FRAUDULENT CONVEYANCES, 9; HUSBAND AND WIFE, 13, 14;
JURISDICTION, 1; PARTITION, 3; PARTNERSHIP, 4, 5.

ERROR.

See APPEAL; FORGERY, 5; HOMICIDE, 9.

ESCAPE.

See HOMICIDE, 6.

ESTATES.

See DEVISE, 1.

ESTOPPEL.

1. AN ESTOPPEL IS NOT CONFINED TO A JUDGMENT, BUT EXTENDS TO ALL FACTS INVOLVED in it as necessary steps or the groundwork upon which it must have been founded. *Sly v. Hunt*, 403.

2. ELECTION OF REMEDIES.—On a sale of goods for cash, and a failure of payment, the vendor, by bringing an action by attachment against the purchaser to recover the purchase price, is not estopped from dismissing that action before judgment, and then maintaining an action for the conversion of the goods. *Johnson-Brinkman Commission Co. v. Central Bank*, 615.

See CORPORATIONS, 10, 20; HOMESTEAD, 5; JUDGMENTS, 9, 12, 14, 15; MORTGAGES, 9; OFFICERS, 2.

EVIDENCE.

1. **EVIDENCE AS TO WHAT BOOKS BROKERS USUALLY KEEP IS NOT ADMISSIBLE** where the testimony shows what books were actually kept, and what became of them. *Gillett v. Whiting*, 762.
2. **EVIDENCE OF THE VALUE OF LAND.**—When the question is whether a principal, by uniting in a conveyance and sale of land instead of selling it under execution, has thereby injured a surety of the debt for which the judgment was entered, the question to be submitted to the jury is not, what is the cash value of the land if sold by the sheriff at public auction, but what is its fair market value at the time of the sale thereof? *Montgomery v. Sayre*, 271.
3. **EVIDENCE OF THE VALUE OF LAND IS NOT NECESSARILY CONFINED TO THE VERY DAY** on which it was sold, but may include other periods before and after such sale. *Montgomery v. Sayre*, 271.
4. **STATUTES OF SISTER STATE, PROOF OF.**—The statutes of another state printed in compiled form by authority of a statute thereof are admissible in evidence without further proof, though published by a private person under authority of such statute. *Falls v. United States Savings etc. Co.*, 194.
5. **PLEADING—FOREIGN LAWS NEED NOT BE SPECIALLY PLEADED, WHEN.**—The rule that foreign laws must be pleaded and proved like other facts is not applicable when they consist of mere matters of evidence. Hence, under a general plea of payment, it is competent for a debtor to prove that, according to the laws of a sister state upon which the nature of his obligation depends, a creditor's acceptance of his debtor's promissory note for a pre-existing debt operates as an extinguishment thereof. *Thomson-Houston Electric Co. v. Palmer*, 536.
6. **NEGOTIABLE INSTRUMENTS—PAROL EVIDENCE INADMISSIBLE TO CONTRADICT INDORSEMENT.**—The indorsement of commercial paper, "without recourse," creates an express and complete contract, which cannot be varied or contradicted by parol evidence of a contemporaneous agreement by which the indorser undertook to be liable, as guarantor, for the payment of the instrument. *Youngberg v. Nelson*, 497.
7. **PAROL PROOF OF CONTENTS OF LETTERS, WHEN PERMISSIBLE.**—A sufficient foundation for the introduction of secondary proof of the contents of letters from the plaintiff to one of the defendants is laid by showing that the latter is beyond the jurisdiction of the court, and that, while his deposition was being taken in another state, he refused to produce the letters in question, the terms in which his refusal was couched being such as to indicate clearly that he was acting in the interest of his codefendant. *Thomson-Houston Electric Co. v. Palmer*, 536.
8. **CONFESSIONS—ADMISSIBILITY.**—A voluntary confession or admission by a person accused of murder, made to officers, while in jail, that a gun

found at his house shortly after his arrest is his property is admissible in evidence against him. *Hodge v. State*, 145.

9. A DECLARATION OF A VICE-PRINCIPAL OR FOREMAN at the time when a cliff falls upon and injures an employee is a part of the *res gesta* and therefore admissible in an action against his employer by another servant to recover for injuries sustained by such fall. *Elledge v. National City etc. Ry. Co.*, 290.
 10. MARRIED WOMEN—SEPARATE ESTATE—DECLARATIONS OF THE HUSBAND. As between a husband's creditors and his wife, claiming the property in dispute as her separate estate, the declarations of the husband as to the ownership of the property are not admissible as against the wife. *Tropnell v. Conklyn*, 30.
 11. PUBLIC OFFICERS, PRESUMPTION IN FAVOR OF ACTS OF.—In the absence of any showing, it is presumed that a public officer's action is correctly taken, and that he has complied with all the requirements of law. *Leonard v. Sparks*, 646.
 12. PRESUMPTION.—THE COMMON LAW OF ONE STATE is presumed to be the same as that of another state where the action is brought. *Alabama etc. R. R. Co. v. Carroll*, 163.
- See APPEAL, 1-5, 7; BROKERS, 4; CARRIERS, 1; CORPORATIONS, 19; CRIMINAL LAW, 3; FORGERY, 5; HOMICIDE, 3-5; INTEREST; JUDGMENTS, 8; LARCENY; LIBEL, 3, 4; PAYMENT, 3, 4; PUBLIC LANDS, 6; TRIAL, 2, 3; VENDOR AND PURCHASER, 7, 8; WILLS, 4-6.

EXECUTION.

1. LABORER WITHIN MEANING OF EXEMPTION STATUTE, WHO IS NOT.—One who contracts to manufacture brick at a fixed price per thousand, furnishing and paying all help, keeping the machinery in good order and feeding a team supplied by the other contracting party, is not a "laborer" within the meaning of a statute providing that no property of a debtor shall be exempt from levy and sale on execution or attachment for "clerks', laborers', or mechanics' wages." *Henderson v. Nott*, 720.
2. A GRANARY WHICH IS APPURTENANT TO AN EXEMPT HOMESTEAD IS ITSELF EXEMPT, and its severance from the freehold through the wrongful act of a trespasser does not deprive it of its exempt character. *Wylie v. Grundysen*, 509.
3. EXEMPTION OF PROBATE HOMESTEADS.—A HOMESTEAD SELECTED BY THE COURT, AND SET APART TO THE SURVIVING WIFE in proceedings to administer upon her husband's estate, is exempt from execution under any judgment for a debt existing against her in his lifetime, though the statute does not in express terms declare such exemption, if there is a general provision in the code respecting homesteads and their selection, to the effect that a homestead is exempt from execution or forced sale. *Keyes v. Cyrus*, 296.
4. JUDGMENT FOR VALUE OF CONVERTED PROPERTY WHEN EXEMPT FROM LEVY.—A judgment recovered for the value of an exempt granary, which has been severed from the homestead through the wrongful act of a trespasser, is to be treated as a judgment for exempt personal property, and is therefore exempt from execution. *Wylie v. Grundysen*, 509.
5. SHERIFF'S LIABILITY FOR VIOLATION OF EXEMPTION LAWS.—To fix a liability upon a sheriff for a wrongful levy upon an exempt judgment,

he should be given proper notice, or demand should be made upon him before suit is brought, but proof that such demand was made is not necessary, if the proceeds of the execution sale were paid over before the plaintiff was duly notified of the levy, and thus enabled to make a seasonable demand. *Wylie v. Grundysen*, 509.

6. **EXECUTION SALES.**—A PURCHASER AT AN EXECUTION SALE WHO PAYS THE AMOUNT OF HIS BID WITHOUT NOTICE OF A VENDOR'S LIEN against the property purchased, though he receives notice of such lien before he becomes entitled to the sheriff's deed, is not affected by the lien, and it cannot be enforced against him. *Maroney v. Boyle*, 821.

See CREDITOR'S SUIT, 2.

EXECUTORS AND ADMINISTRATORS.

See MECHANICS' LIENS, 6; PARTNERSHIP, 1.

EXEMPTION.

See EXECUTION, 1-5; HOMESTEAD, 2, 3, 5; INJUNCTIONS.

EX MALEFICIO.

See TRUSTS, 3.

FALSE REPRESENTATIONS.

See NEGOTIABLE INSTRUMENTS; VENDOR AND PURCHASER, 6.

FELLOW-SERVANTS.

See MASTER AND SERVANT, 15, 16.

FENCES.

See RAILROADS, 12.

FOOTPRINTS.

See CRIMINAL LAW, 3; WITNESSES, 6.

FORECLOSURE.

See CORPORATIONS, 19, 20; INTERVENTION, 2; MORTGAGES, 7-11; TRUSTS, 6, 10.

FORFEITURE.

See DEEDS, 7-9; VENDOR AND PURCHASER, 3.

FORGERY.

1. IT IS NOT INDISPENSABLE to constitute the crime of forgery that the writing, if genuine, be sufficient to form the basis of a legal liability. *People v. Munroe*, 323.
2. A CONTRACT AGAINST PUBLIC POLICY and therefore illegal and void, may nevertheless be the subject of forgery. *People v. Munroe*, 323.
3. A MORTGAGE OF A HOMESTEAD MAY BE A FORGERY and punishable as such, though it purports to be executed by the husband alone, and would therefore be inoperative, even if genuine, if such mortgage was forged with intent to defraud a person named in the information. *People v. Baker*, 276.

4. **INDICTMENT—VARIANCE.**—THE FACT THAT A MORTGAGE ALLEGED to have been forged does not, as set out in the indictment, contain a copy of the certificate of acknowledgment affixed thereto, does not establish a fatal variance. *People v. Baker*, 276.
5. **EVIDENCE.**—If a mortgage alleged to have been forged is set out in the indictment, and contains a copy of the note to be secured thereby, it is not error to admit evidence of the signing of the note, as well as the mortgage by the accused. *People v. Baker*, 276.
6. **A SUFFICIENT UTTERING OF A FORGED MORTGAGE** is shown by evidence tending to prove that it was placed upon record by a person other than the mortgagee, though never delivered to the latter, if the object of placing it upon record was to obtain a loan from him and to otherwise defraud him. *People v. Baker*, 276.

See **BANKS**, 3, 6; **OFFICERS**, 1.

FRAUD.

- PRESUMPTION—FAILURE TO APPEAR.**—The failure of a party charged with fraud to appear and deny what is peculiarly within his own knowledge raises a presumption against him. *Connecticut etc. Ins. Co. v. Smith*, 656.
- See **APPEAL**, 15, 16; **BANKS**, 6; **CORPORATIONS**, 13, 17; **CREDITOR'S SUIT**; **FRAUDULENT CONVEYANCES**; **HUSBAND AND WIFE**, 7, 13; **LIMITATIONS OF ACTIONS**, 3; **NEGOTIABLE INSTRUMENTS**; **TRUSTS**, 3; **VENDOR AND PURCHASER**, 13.

FRAUDULENT CONVEYANCES.

1. **A TRANSFER OF A HOMESTEAD CANNOT BE FRAUDULENT AS AGAINST CREDITORS OF THE GRANTOR**, because they have no right to resort to it for the payment of their demands. *Piptin v. Williams*, 241.
2. **AN INTENTION TO DEFRAUD EXISTING CREDITORS** may be inferred where a debtor, in embarrassed circumstances, executes a mortgage, which secures an amount largely in excess of the sum actually due to the mortgagee, and is not given to cover future advances. *Hanson v. Bean*, 516.
3. **RELATIONSHIP OF PARTIES, EVIDENCE OF FRAUD.**—The fact that there is a family relationship between the parties to a mortgage is material in determining whether it is fraudulent as to existing creditors, and, where that question arises, the jury are properly instructed that preferences claimed by way of mortgage, under such circumstances, should be carefully scrutinized. *Hanson v. Bean*, 516.
4. **THE RECOVERY OF A JUDGMENT IN ANOTHER STATE** does not make the plaintiff a judgment creditor within this state having the right to attack a conveyance of his debtor on the ground that it was made to defraud creditors. *Brown v. Campbell*, 314.
5. **NOTICE OF FRAUD IN A CONVEYANCE**, by which a party is defrauded of his property, need not consist of positive information brought directly home to the party sought to be charged, but any thing which puts a prudent man on inquiry is notice in such case. *Connecticut etc. Ins. Co. v. Smith*, 656.
6. **INADEQUATE CONSIDERATION AS NOTICE.**—A purchase of property for a one hundred and fiftieth part of its real value is in itself actual notice of fraud on the part of the grantor. *Connecticut Ins. Co. v. Smith*, 656.
7. **BONA FIDE PURCHASER—BURDEN OF PROOF.**—One claiming to be a *bona fide* purchaser from a fraudulent grantor has the burden of proof to establish his claim. *Connecticut Ins. Co. v. Smith*, 656.

8. **WHO MAY ATTACK.**—No creditor can be said to be delayed, hindered, or defrauded by any conveyance until some property, out of which he has a specific right to be satisfied, is withdrawn from his reach by a fraudulent conveyance. This specific right does not exist until he has bound the property by a judgment, or by a judgment and execution, as the case may be, and has shown that he is defrauded by the conveyance in consequence of not being able to procure satisfaction of his debt in due course of law. *Brown v. Campbell*, 814.
9. **REIMBURSEMENT OF PURCHASE MONEY.**—A fraudulent grantee, whose title to land is annulled by a court of equity, is not entitled to be reimbursed for purchase money paid by him of his own wrong and in furtherance of an actual fraud. *Connecticut etc. Ins. Co. v. Smith*, 656.
- See **HUSBAND AND WIFE**, 18; **LIMITATIONS OF ACTIONS**, 2; **SALES**, 4.

FREIGHT.

See **CARRIERS**, 1.

GIFTS.

See **CHARITIES**, 1; **HUSBAND AND WIFE**, 20-22.

GRANTS.

See **PUBLIC LANDS**, 1.

GUESTS.

See **INNKEEPERS**.

HEIRS.

See **PAYMENT**, 4.

HIGHWAYS.

HIGHWAYS AND STREETS.—THE OWNER OF LAND OVER WHICH A HIGHWAY IS LAID RETAINS his right in the soil for all purposes consistent with the full enjoyment of the easement acquired by the public. This right may grow less as the public needs increase, but at all times he retains all that is not needed for the public use, subject, however, to municipal and police regulations. *Allen v. Boston*, 423.

HOLIDAYS.

See **SUNDAY**.

HOMESTEAD.

1. **HOMESTEAD IN LANDS HELD IN COTENANCY.**—An undivided interest in real estate, accompanied by the requisite occupancy of the owner and his family will support a homestead claim. *Giles v. Miller*, 730.
2. **A STATUTE GRANTING HOMESTEAD RIGHTS OF EXEMPTION**, being remedial in its nature, should be liberally construed in favor of the manifest purpose of the legislature. *Keyes v. Cyrus*, 296.
3. **HOW FAR FREE FROM JUDGMENT LIEN IN PURCHASER'S HANDS.**—The purchaser of land held and occupied as a homestead, and which does not exceed the amount of the statutory exemption, takes the same free from the lien of a judgment docketed against the vendor prior to such purchase. *Giles v. Miller*, 730.

4. IF AN ATTACHMENT IS LEVIED UPON A HOMESTEAD, and such homestead is subsequently abandoned, the attachment becomes operative from the date of its levy, and takes precedence over subsequent conveyances of the property. *Pipkin v. Williams*, 241.
5. RIGHTS OF WIFE IN, NOT AFFECTED BY ACTS OF HUSBAND, WHEN.—The filing of a sworn statement by a judgment debtor, in which for the purpose of securing the exemption of his personalty, he alleges that he has no lands occupied as a homestead, and a subsequent recovery by him of that personalty, in an action of replevin brought against the purchaser at the execution sale thereof, will not estop the wife of such judgment debtor from asserting her rights in a homestead previously declared upon his land. *Giles v. Miller*, 730.
6. A CONVEYANCE OF A HOMESTEAD IN WHICH THE HUSBAND ALONE APPEARS AS GRANTOR, but containing a clause declaring that the wife releases to the grantee all her right or possibility of dower, the deed being signed and acknowledged by both spouses, cannot be regarded as executed by the wife for any purpose except to release her dower, and is therefore inoperative as against the homestead rights either of herself or of her husband. *Pipkin v. Williams*, 241.
7. A CONVEYANCE OF A HOMESTEAD IN WHICH THE WIFE DOES NOT JOIN is absolutely void under a statute declaring that no conveyance affecting the homestead of a married man shall be of any validity unless his wife joins in the execution thereof. *Pipkin v. Williams*, 241.
See EXECUTION, 2-4; FORGERY, 3; FRAUDULENT CONVEYANCES, 1.

HOMICIDE.

1. AN ACTUAL INTENTION TO TAKE LIFE IS NOT AN ESSENTIAL ELEMENT OF MANSLAUGHTER in the first degree. Therefore an instruction to the effect that a defendant should be found guilty of that offense if he intentionally did an act which was calculated to produce, and did produce, fatal results, is not open to exception. *Lewis v. State*, 75.
2. PREMEDITATION, WHEN PRESUMED.—The existence of the formed design necessary to constitute the crime of murder is presumed from the intentional use of a deadly weapon with a fatal result. *Handley v. State*, 81.
3. MURDER—EVIDENCE OF MOTIVE.—On a trial for murder, evidence that an indictment for another crime is pending against the accused, and that the deceased was a prosecuting witness in that case, is admissible, when offered in connection with threats by the accused to take the life of the deceased, because she was a witness against him in that case, to show motive for the perpetration of the crime. *Hodge v. State*, 145.
4. MURDER—EVIDENCE—COLLATERAL FACTS.—On a trial for murder, rags and paper blackened, as if by powder, found near the place where the deceased was killed by gunshot wounds, are admissible in evidence against the accused, when it appears that one barrel of a double-barrel shotgun belonging to the latter, and found concealed in his house shortly after his arrest, was empty, while the other contained rags and paper similar to those admitted in evidence. *Hodge v. State*, 145.
5. TESTIMONY OF DEFENDANT'S INTENTION NOT COMPETENT.—One accused of homicide cannot be allowed to introduce testimony as to the uncommunicated intention with which he did the act which inflicted the fatal wound. *Lewis v. State*, 75.

6. **KILLING MISDEMEANANT SOLELY TO PREVENT HIS ESCAPE NOT JUSTIFIABLE.**—Neither an officer charged with the duty of arresting a misdemeanor, nor a private person, who is lending his aid to effect the arrest, at the officer's request, is justified in killing such misdemeanor solely for the purpose of preventing his escape. *Handley v. State*, 81.
7. **MURDER UNDER COMPULSION.**—A man cannot excuse or justify the killing of an innocent man under the plea that compulsion was exerted and operated upon him at the time, and forced him to the commission of the act, if he might have avoided the necessity by escape before that time. *Arp v. State*, 137.
8. **DRUNKENNESS ON THE PART OF THE ACCUSED** at the time of committing a homicide may have the effect of reducing the offense from murder to manslaughter, if shown to have been so excessive as to render him incapable of forming the design to take life, but there is no principle of law which authorizes drunkenness to be invoked as an excuse for crime, or as a ground for enlarging the right of self-defense. *Springfield v. State*, 85.
9. **CHARACTER OF DEFENDANT—INSTRUCTIONS PROPERLY REFUSED.**—When, on the trial of one accused of murder, evidence has, without objection, been admitted to the effect that the defendant had told the witness, on the morning of the day of the homicide, that "he had killed five men while guarding convicts," and that, "on the previous night, while the defendant and the witness were near the dwelling-house of the deceased, he, the defendant, would have shot the deceased, if he had shown his head at the door," it is not error to refuse instructions which assert that there was no evidence that the defendant "ever killed any other person," "ever shed any other person's blood," or "liked to shed man's blood." *Handley v. State*, 81.
10. **CRIMINAL LAW—GOOD CHARACTER AS A DEFENSE.**—Proof of the good character of the accused is admissible in all criminal cases, not only where doubt exists on the other proof, but also to generate a doubt; but an instruction should not be granted, which would leave the jury to infer that the good character alone of one accused of murder might, if proved to their satisfaction, raise a reasonable doubt that the killing was done by the defendant with a criminal intent. *Springfield v. State*, 85.
11. **SELF-DEFENSE, CORRECT INSTRUCTIONS AS TO LAW OF.**—An instruction to the effect that, in the system of self-defense established by the law, "no balm or protection is provided for wounded pride or honor in declining combat, or sense of shame in being denounced as cowardly" is a correct exposition of the law. *Springfield v. State*, 85.
12. **SELF-DEFENSE, WHAT IS.**—Self-defense is the resistance of force or seriously threatened force, either actually pending or reasonably apparent, by force sufficient to repel the actual or apparent danger and no more. If it goes beyond this, there is guilt which is not excusable or justifiable. *Springfield v. State*, 85.
13. **SELF-DEFENSE, CIRCUMSTANCES INSUFFICIENT TO SUSTAIN PLEA OF.**—In a trial for murder, if the whole evidence, including the defendant's own testimony as to his means and opportunity for avoiding, without danger to himself, the necessity of slaying the deceased, can lead to no other conclusion but that, having merely to choose between committing the homicide or turning loose a "wild and skittish mule," he elected to take the life of the deceased and hold on to the mule, the

conditions necessary to make out a case of self-defense are not established. *Springfield v. State*, 85.

24. ABILITY OF DEFENDANT TO RETREAT SAFELY A QUESTION FOR THE JURY.—An instruction which assumes as a matter of law that, on the facts therein postulated, the defendant in a prosecution for murder could not have retreated without endangering his life, is properly refused. *Springfield v. State*, 85.
25. SELF-DEFENSE—HOSTILE DEMONSTRATIONS BY DECEASED.—The defendant in a prosecution for homicide cannot complain of the refusal of the court to give an instruction which assumes, as a matter of law, that the mere drawing of a knife by the deceased in a hostile manner, created an impending imperious necessity for the defendant's slaying him in self-defense. It is not enough that the deceased had at hand the means for effecting a deadly purpose with respect to the defendant, but it must also appear, by some act or demonstration of the former, that he intended, at the time of the killing, to carry out his purpose, or the circumstances must be such as to create a reasonable belief in the mind of the slayer, that it was necessary to deprive his assailant of his life to save his own. *Springfield v. State*, 85.
26. DUTY TO RETREAT—BURDEN OF PROOF.—When the intentional killing of the deceased by the defendant has been shown by the uncontradicted testimony of the state, the burden is then cast upon the defendant to show not only a pressing necessity, actual or reasonably apparent, to take the life of the deceased in self-defense, but also his inability to retreat safely without apparently increasing his peril. *Springfield v. State*, 85.
27. ABSTRACT INSTRUCTIONS PROPERLY REFUSED.—If, in a trial for murder, no testimony is introduced which tends to show that the killing was accidental, the court is justified in refusing to instruct the jury upon that hypothesis. *Lewis v. State*, 75.
28. FAILURE TO INSTRUCT AS TO DEFENDANT'S TESTIMONY, WHEN NOT ERROR.—The mere fact that, in a trial for homicide, the court has omitted, in its general charge, to instruct the jury on the hypothesis that the defendant's testimony might be true, affords, in the absence of a special request for such instruction, no ground for an exception. *Lewis v. State*, 75.
29. MURDER—FAILURE OF ACCUSED TO DENY GUILT—EFFECT ON.—The failure of an accused, when testifying as a witness, to deny that he fired the fatal shot, is not an admission of guilt, but is only a circumstance, the weight of which is for the jury in the light of all the evidence. *Hodge v. State*, 145.

See APPEAL, 13; EVIDENCE, 8.

HOTELS.

See INNKEEPERS.

HUSBAND AND WIFE.

1. ESTATE BY ENTIRETIES.—A devise to a husband and wife vests in them an estate by entireties which the husband has the right to use during coverture, but cannot alienate. *Phelps v. Simons*, 430.
2. ENTIRETIES.—A WIFE who is a tenant by the entireties with her husband of shares of stock in a corporation cannot be compelled to surrender the

- certificate of such stock to her husband's transferee. *Phelps v. Simons*, 430.
3. **ENTIRETIES—PERSONAL PROPERTY.**—A BEQUEST TO A HUSBAND and wife vests in them an estate by the entirety. *Phelps v. Simons*, 430.
 4. **ENTIRETIES IN PERSONAL PROPERTY, HUSBAND'S CONTROL OVER.**—If personal property is bequeathed to a husband and wife, and he undertakes to transfer it, his transfer vests in the transferee an estate for the life of the husband, but cannot deprive the wife of her right of survivorship should her life be prolonged beyond his. *Phelps v. Simons*, 430.
 5. **MARRIED WOMAN'S CONTRACT.**—A mortgage executed by a wife with her husband's assent as security for a loan used by her to redeem land in which she has a right of redemption is the contract of the wife, and not a loan to the husband. *Falls v. United States Sav. etc. Co.*, 194.
 6. **WIFE'S DEFECTIVE DEED NOT CURED BY HUSBAND'S SUBSEQUENT DEED, WHEN.**—A married woman's deed, defective for the reason that her husband did not join therein, is not validated by a subsequent deed executed by the husband alone. *Rollins v. Mitchell*, 519.
 7. **A JUDGMENT CONFERRED BY A HUSBAND IN FAVOR OF HIS WIFE** for a debt justly due from him to her, on account of her separate estate, is valid against all persons unless impeached for fraud. *Bennett v. Bennett*, 47.
 8. **MONEY IS NOT NECESSARIES, AND A MARRIED WOMAN** living separate from her husband cannot borrow money on his credit to purchase necessities and thus create a liability against him. *Skinner v. Tirrell*, 447.
 9. **TRANSACTIONS BETWEEN—EVIDENCE TO IMPEACH.**—In transactions between husband and wife less proof is required to impeach the act, and more and stricter proof to repeal impeachment than between strangers. *Bennett v. Bennett*, 47.
 10. **MARRIED WOMEN—SEPARATE ESTATE.—WIFE'S CHOSES IN ACTION**, not reduced to his possession by the husband before a statute takes effect vesting such choses in the wife as her separate estate, cannot thereafter be reduced to his possession by the husband or his creditors. *Trapnell v. Conklyn*, 30.
 11. **MARRIED WOMEN—SEPARATE ESTATE.**—Property, real or personal, purchased by a married woman from a stranger, on credit, becomes her separate estate, although she pays for it out of the profits arising from her use thereof, whether she antecedently had any separate estate or not. *Trapnell v. Conklyn*, 30.
 12. **MARRIED WOMEN—SEPARATE ESTATE.**—Profits produced by the skill and labor of a married woman in the use of her separate estate while living with her husband are a part of such estate, and not earnings belonging to her husband. *Trapnell v. Conklyn*, 30.
 13. **MARRIED WOMEN—SEPARATE ESTATE—PROFITS FROM HUSBAND'S LABOR.**—The mere fact that an insolvent husband devotes his time and labor upon his wife's separate estate, and profit results therefrom, does not, in the absence of fraud, make such profits his property, nor render them liable for his debts. If, after the support of the family is provided for, a surplus of profits still remains, equity, in proper cases, divides the surplus between the wife and the husband's creditors. *Trapnell v. Conklyn*, 30.
 14. **MARRIED WOMEN—SEPARATE ESTATE—PROFITS TO WHOM BELONGS.**—Mere participation by the husband in the production of profits out of the wife's separate estate does not make them liable to his creditors, while the husband and wife are living together, without regard to the support

- of the family. If, in such cases, substantial property, traceable to the skill and labor of the husband, is found to exist, courts of equity will make a just apportionment thereof between the wife and her husband's creditors. *Trapnell v. Conklyn*, 30.
15. **MARRIED WOMEN—SEPARATE ESTATE—HUSBAND AS AGENT.**—A married woman with separate estate may barter and trade with reference thereto by her husband as agent, and she will still be entitled to the increase thereof. The marital relation does not prevent nor disqualify the husband from acting as his wife's agent with reference to her separate estate, nor will his agency render her property or its profits liable to his creditors. *Trapnell v. Conklyn*, 30.
16. **SEPARATE PROPERTY.**—A HUSBAND MAY RELINQUISH his right to the earnings of his wife, and if she and he orally agree that any compensation she may earn in nursing and caring for a person whom she is under no legal obligation to nurse and care for shall be hers such agreement is valid and entitles her to sue for the compensation due for such services, as for her separate estate, if a statute of the state authorizes husband and wife to make any contract with each other, or with any other person, respecting property which either might if unmarried. It is not necessary that the person to whom the services were rendered should have had knowledge of the agreement between the husband and wife. *Wren v. Wren*, 287.
17. **INDEBTEDNESS BETWEEN.**—The reception and use by a husband in his business of the proceeds of his wife's land implies a promise to repay her, and, as between them, creates a valid indebtedness. *Riley v. Vaughan*, 586.
18. **RIGHT TO PREFER WIFE AS CREDITOR.**—A husband in failing circumstances, who owes a debt to his wife, may prefer her as a creditor to the exclusion of others, and a transfer of property made by him to her for this purpose in good faith, without fraud on his part, or if with such fraud, without participation therein by her, must be upheld. *Riley v. Vaughan*, 586.
19. **FRAUDULENT CONVEYANCES BETWEEN.**—A wife who gives her husband unlimited control of her property and money, and permits him to invest it in his own business for a series of years, is not, in case of his insolvency, permitted to shield his property from the just claims of persons who, in good faith, have given the husband credit in reliance upon his ownership. In such case a conveyance of property by the husband to the wife is fraudulent and void as to his creditors. *Riley v. Vaughan*, 586.
20. **LOAN OUT OF SEPARATE ESTATE—PRESUMPTION.**—A loan by a wife to her husband out of her separate estate to be valid as a loan must be accompanied with an express promise of repayment made at the time. Otherwise it is presumed to be a gift. *Bennett v. Bennett*, 47.
21. **GIFT, PRESUMPTION OF.**—Money of the wife received from her by her husband, though belonging to her separate estate, is presumed to be a gift. Before she can recover it from him or his estate as against his creditors, she must establish by clear proof that it was a loan with an express promise of repayment made at the time of the transaction. *Bennett v. Bennett*, 47.
22. If a husband uses and deals with separate property of his wife as his own, a gift is presumed, and their testimony of a private understanding between themselves that the transaction was intended as a loan, is not

sufficient as against the creditors of the insolvent husband, to rebut the presumption. *Bennett v. Bennett*, 47.

See EVIDENCE, 10; HOMESTEAD, 5-7; SUBROGATION, 2.

IMPEACHMENT.

See PUBLIC LANDS, 5; HUSBAND AND WIFE, 9.

IMPROVEMENTS.

See CONTRACTS, 9.

INCOME.

See CREDITOR'S SUIT, 2.

INDEMNITY.

See BONDS; JUDGMENTS, 8-12.

INDICTMENT.

See FORGERY, 4.

INDORSEMENT.

See EVIDENCE, 6.

INFANTS.

RESTITUTION OF CONSIDERATION UPON AVOIDANCE OF CONTRACTS BY, WHAT NECESSARY.—One seeking to avoid a contract on the ground of infancy will be required to make restitution only of that part of the consideration still in his hands, when he attains his majority, or when he elects to disaffirm. It is not necessary as a condition to such relief, that he should return an equivalent for property wasted or squandered. *Bloomer v. Nolan*, 690.

See MECHANICS' LIENS, 1; NEGLIGENCE, 9; RAILROADS, 15; REAL PROPERTY, 4-6; STATUTES, 5, 6.

INFORMATION.

1. **CRIMINAL LAW.**—AN INFORMATION CHARGING AN OFFENSE is not materially defective because it does not contain the word "information" in the body of the pleading, if such word is used in the heading, and the facts specifically alleged constitute the crime sought to be charged. *People v. Baker*, 276.

2. **CRIMINAL LAW—VENUE, STATEMENT OF.**—An information having in the body thereof the words "county of Los Angeles, state of California," and charging the commission of a crime "at the county and state aforesaid," sufficiently avers the place of such commission. *People v. Baker*, 276.

See CORPORATIONS, 14-17.

INJUNCTIONS.

1. **EXEMPTIONS—INJUNCTION TO PROTECT PROPERTY IN ANOTHER STATE.**—If a creditor and debtor are citizens of, and residents in, the same state, and the creditor institutes an action by attachment and garnishee proceedings in another state to reach property or credits due the debtor there, and exempt from legal process in the state where the parties are

domiciled, such creditor may be enjoined from further prosecuting his action in the other state. *Allen v. Buchanan*, 187.

2. **MECHANICS' LIENS—FORECLOSURE—INJUNCTION RESTRAINING SALE.**—As a sale of property belonging to an insolvent estate, under a void judgment of foreclosure of a mechanic's lien, would constitute a cloud on the assignee's title, although he is not made a party to the suit, he may maintain an action to restrain such sale. *Quinby v. Stupper*, 899.

INNKEEPERS.

1. **INNKEEPER AND GUEST, EVIDENCE INSUFFICIENT TO ESTABLISH RELATION OF.**—Evidence which merely shows that a man and his family were received as boarders and lodgers at a hotel, and continued to board and lodge there for about six months at a weekly rate, does not affirmatively establish the relation of guest and innkeeper, so as to subject the latter to the liability, or give him the rights, incident to that relation. *Singer Mfg. Co. v. Miller*, 568.
2. **INNKEEPER'S LIEN, GOODS IN POSSESSION OF BOARDER, NOT SUBJECT TO.**—The fact that goods in the possession of a guest at an inn belong to a third person does not prevent the innkeeper from having a lien thereon, provided he has no notice of such ownership, but this rule has no application, where the party in possession of the goods is received as a boarder. *Singer Mfg. Co. v. Miller*, 568.

INSOLVENCY.

1. **CONFLICT OF LAWS.—AN ASSIGNMENT BY A COURT** of insolvency of one state cannot of its own force convey to the assignee the title to land situate in another state, unless the laws of the latter state accord to the assignment that effect. *Chipman v. Peabody*, 437.
2. **CONFLICT OF LAWS.—IF THERE ARE TWO INSOLVENCIES OR BANKRUPTCIES** of the person in different states, the title of the assignee to the land of the debtor situate in each must be determined by the laws of the state where the land is situated. Therefore a mortgage or transfer of lands by an insolvent valid in the state in which they are situated cannot be avoided in the other state because forbidden by its laws. *Chipman v. Peabody*, 437.

See **ASSIGNMENT FOR THE BENEFIT OF CREDITORS; CREDITOR'S SUIT; MECHANICS' LIENS; PARENT AND CHILD**, 4.

INSTRUCTIONS.

See **APPEAL**, 5, 7, 10, 13; **HOMICIDE**, 1, 9, 12, 14, 15, 17, 18; **TRIAL**, 5, 8, 9; **WITNESSES**, 3.

INSURANCE.

DOUBLE INSURANCE, POLICY NOT AVOIDED BY, WHEN.—A policy of fire insurance, containing the stipulation against "other insurance," is not invalidated by the fact that, at the time of its issuance, a prior policy covering the same property is in existence, unless the assured has an interest in such prior policy, or will derive a benefit under it in the event of the property's being burned. *Copeland v. Phoenix Ins. Co.* 134.

INTEREST.

1. **RIGHT TO RECOVER UNEARNED INTEREST PAID IN ADVANCE.**—No part of the interest paid in advance on a note according to its term can

be recovered upon a voluntary payment of the principal, during the time for which the interest has been paid, in the absence of a promise by the payee to return unearned interest in case of such payment, or of a reservation of the right to bring suit within the time for which interest has been paid. *Skelly v. Bristol Sav. Bank*, 340.

2. **PAYMENT OF IN ADVANCE—FORBEARANCE TO SUE.**—The taking of interest in advance on a note is, in the absence of any agreement to the contrary, *prima facie* evidence of an agreement to forbear collection of the note during the period for which interest has been paid. *Skelly v. Bristol Sav. Bank*, 340.

See USURY.

INTERSTATE COMMERCE.

1. **FOREIGN CORPORATIONS.**—The power of Congress to regulate commerce, includes commerce carried on by corporations as well as commerce carried on by natural persons, and a state can no more regulate commerce carried on by the former than such commerce carried on by the latter. *Gunn v. White Sewing Machine Co.*, 223.
2. **IF A CORPORATION FORMED UNDER THE LAWS OF ONE STATE** enters into a contract with residents of another state to act as its agents in the sale of its property in the latter state, and such agents give a bond with sureties to account for and pay over the proceeds of such sale, and thereafter goods are shipped by the corporation to such agents upon orders received in the state of its domicile, a statute of the state to which the goods are shipped declaring that all contracts of foreign corporations doing business therein shall be void unless such corporation shall have filed a certificate in the office of the secretary of the state designating an agent upon whom process may be served, is inoperative against such bond, because to give it operation would be to permit the state to regulate interstate commerce. *Gunn v. White Sewing Machine Co.*, 223.

INTERVENTION.

1. **WHEN NOT PERMISSIBLE.**—Permission to intervene in an action brought by the assignee of a contract of sale to recover the balance of the sum due upon the contract is properly denied, where the complaint of the applicant, a judgment creditor of the assignor of the contract, merely alleges that the assignment was fraudulent, that the assignor is entitled to the money sued for, and that the plaintiff has attached that money in garnishment proceedings duly instituted against the assignor, and still undetermined. *Dennis v. Spencer*, 499.
2. **INTERVENTION IN FORECLOSURE PROCEEDINGS, WHO MAY OBJECT TO.**—The trustee in a trust deed executed by a railway company to secure an issue of bonds, and providing that foreclosure proceedings by the individual bondholders are not to be resorted to until the trustee has refused to comply with the request of a certain number of the bondholders to institute such proceedings, is entitled to resist the application of individual bondholders to be allowed, contrary to that provision, to intervene in a foreclosure suit already instituted by himself. *Seibert v. Minneapolis etc. Ry. Co.*, 530.
3. **INTEREST NECESSARY TO ENTITLE THIRD PARTY TO PRIVILEGE OF.**—The interest which entitles a party to intervene in an action between other parties must be in the matter in litigation in the suit as originally brought, and of such a direct and immediate character that the inter-

vener will either gain or lose by the direct legal effect of the judgment therein. *Dennis v. Spencer*, 499.

See PLEADING, 3.

INTOXICATION.

See HOMICIDE, 8.

JOINT LIABILITY.

1. **ELECTION BETWEEN REMEDIES—MAINTAINING AN ACTION AGAINST A SURVIVING PARTNER FOR AN ACCOUNTING**, and recovering a personal judgment against him for the amount found to be due, furnishes no evidence of an election between inconsistent remedies, to the extent of protecting other wrongdoers from the consequences of their wrong. *Russell v. McCall*, 807.
2. **ELECTION.—PURSUING ONE OF SEVERAL WRONGDOERS** is not an election to pursue them severally, so that thereafter no joint action can be had against them—at least, this objection will not be sustained when made by one who has never before been sued. *Russell v. McCall*, 807.
3. **ONE OF SEVERAL WRONGDOERS IS LIABLE TO THE FULL AMOUNT** of a conversion or misappropriation in which he has participated. *Russell v. McCall*, 807.
4. **IF SEPARATE JUDGMENTS HAVE BEEN OBTAINED AGAINST TWO WRONGDOERS** for the same wrong, the satisfaction of either satisfies the other, except as to costs. *Russell v. McCall*, 807.
5. **A JUDGMENT AGAINST ONE OF SEVERAL WRONGDOERS UNSATISFIED** is not a bar to the maintenance of an action against the others. *Russell v. McCall*, 807.

See MERGER; RAILROADS, 19.

JUDGMENTS.

1. **IF A NONRESIDENT IS NOT PERSONALLY SERVED WITH PROCESS WITHIN THE STATE** and does not appear in the action, no valid personal judgment can be entered against him, unless his property is attached in the action, and the effect of such judgment is restricted to the property so attached. *Brown v. Campbell*, 314.
2. **DEEDS—DELIVERY—JUDGMENT—PRIORITY.**—A judgment rendered subsequently to the execution of a deed by the judgment debtor, but before its delivery, has a priority over such deed. *Cravens v. Rossiter*, 606.
3. **JUDGMENTS BY DEFAULT—COLLATERAL ATTACK—NOTICE.**—A judgment by default in a condemnation proceeding in which the defendant was personally served with process five days before the return day is not subject to successful attack collaterally on the ground that the statute requires "at least six days' notice." *Leonard v. Sparks*, 646.
4. **JUDGMENT BY DEFAULT, WHAT IS ADMITTED BY.**—The general rule that a default is an admission of such facts only as are properly alleged in the petition or complaint is subject to the exception, that where, in a foreclosure or other kindred proceeding, a defendant, who is called upon to disclose his supposed but unknown interest in the subject of the action, makes default he will be held to have admitted that his interest therein is subordinate to that of the plaintiff. *Lincoln Nat. Bank v. Virgin*, 747.
5. **A JUDGMENT AGAINST A SURVIVING PARTNER WHICH HAS NOT BEEN SATISFIED** does not bar further efforts to obtain relief against other wrongdoers. *Russell v. McCall*, 807.

6. **MERGER.—A JUDGMENT AGAINST A SURVIVING PARTNER**, in favor of the representative of the deceased partner in a suit for an accounting, does not constitute any defense to any suit against other wrongdoers, who, by intermeddling with the property and assets of the estate, have rendered themselves liable as trustees *de son tort* for the wrong done. *Russell v. McCall*, 807.
7. **MERGER.—A JUDGMENT FOR THE CONVERSION OF A CHATTEL DOES NOT, BEFORE ITS SATISFACTION**, change the title to the property, nor bar an action against any other wrongdoer. *Russell v. McCall*, 807.
8. **ACTION AGAINST INDEMNITOR—EVIDENCE**.—In an action by a city against a car company to recover the amount of a judgment against such city in an action for personal injury caused by holes in the street, and the fact that the rails of the car track were several inches above the surface of the street, of which action notice was given to the company, the pleadings, verdict, and judgment, but not the testimony, in the first action, are admissible in evidence. *St. Joseph v. Union Ry. Co.*, 626.
9. **ESTOPPEL OF AS AGAINST INDEMNITOR**.—One who is required to protect another from liability is bound by the result of litigation to which such other is a party, provided the former had notice of such litigation, and an opportunity to control its proceedings. *St. Joseph v. Union Ry. Co.*, 626.
10. **ACTION AGAINST INDEMNITOR—EVIDENCE**.—In an action by a city against a car company to recover the amount of a judgment against the city in an action, notice of which was given to the company, for personal injuries, resulting, as shown by the record of that action, from holes in the street, and the fact that the track was several inches above the surface of the street, and in which an ordinance providing that the company should lay its track even with the surface of the street, and keep the space between the rails in repair, was introduced in evidence, evidence is admissible to show that the company laid, kept, and maintained its tracks in compliance with the ordinance, and the record in the first case, though admissible in evidence, does not make out a *prima facie* case in favor of the city in the second action, if such record fails to show any breach by the company of its duty under such ordinance. *St. Joseph v. Union Ry. Co.*, 626.
11. **CONCLUSIVENESS AGAINST INDEMNITOR**.—A judgment in an action against a city for injuries resulting from defects in a street caused by the failure of a car company, which is notified of the action, to comply with an ordinance requiring it to lay its tracks on a level with the street, and keep the space between them in repair, the petition alleging that such street was full of holes, that the rails of the track were several inches above the level of the street, and that, by reason thereof, plaintiff was injured, is conclusive in an action by the city against the car company to recover the amount of such judgment, only of the facts that the street was defective as charged, and that by reason thereof plaintiff sustained damage in the amount recovered by such judgment. *St. Joseph v. Union Ry. Co.*, 626.
12. **CONCLUSIVENESS OF AS AGAINST INDEMNITOR**.—A judgment against a party indemnified is conclusive in a suit against his indemnitor only as to the facts thereby established. The estoppel created by the first judgment cannot be extended beyond the issues necessarily determined by it. *St. Joseph v. Union Ry. Co.*, 626.

13. **JUDGMENT NOT BINDING IN SUBSEQUENT ACTION BETWEEN DEFENDANTS, WHEN.**—Where, in an action against a landowner and his mortgagee to enforce a lien on the premises for materials furnished for the construction of a building thereon, neither of the defendants appears, and a personal judgment is rendered by default against the landlord and declared to be paramount to the lien of the mortgage, this judgment, in the absence of proof that the mortgagor was notified to assume the defense of the action, binds only the mortgagee upon the issue of the priority of the materialman's lien, and cannot be introduced as evidence of such priority in a subsequent action instituted by the mortgagee, after satisfying the judgment, to recover the amount paid from the mortgagor and his sureties. *Pioneer Sav. etc. Co. v. Bartsch*, 511.
 14. **JUDGMENTS BEYOND THE ISSUES, NO ESTOPPEL BY.**—A judgment entered by a court outside the issues submitted to its determination, stands upon the same footing as one dealing with a subject matter which is entirely foreign to its jurisdiction, and is therefore a nullity. *Lincoln Nat. Bank v. Virgin*, 747.
 15. **JUDGMENTS AS ESTOPPEL—PHYSICIANS—MALPRACTICE.**—A judgment by default in favor of a physician in an action to recover for his services does not estop the latter from bringing his cross-action for malpractice; but if the patient appears in such suit he is bound to present all his defenses, and the judgment therein is an estoppel to a subsequent action for malpractice. *Lawson v. Conway*, 17.
 16. **RES JUDICATA.**—A DECISION UPON A CONTEST OF A WILL that the testator was of sound and disposing mind at a particular time is conclusive of that question in a subsequent controversy between the same parties in which the same issue is again involved. *Sly v. Hunt*, 403.
 17. **RES JUDICATA.**—A JUDGMENT FROM WHICH A RIGHT OF APPEAL EXISTS cannot support a plea of *res judicata*. *Brown v. Campbell*, 314.
 18. **JUDGMENTS ON DEMURRER—RES JUDICATA.**—Final judgment on demurrer to a petition which goes to the merits renders the whole matter *res judicata*. *Connecticut etc. Ins. Co. v. Smith*, 656.
 19. **A JUDGMENT ENTERED UPON AN AGREEMENT OF COUNSEL AGAINST THE PROHIBITION OF HIS CLIENT** will be vacated upon application seasonably made, though payment of such judgment has also been made to such counsel, if the parties can be placed in *status quo*. *Dalton v. West End etc. Ry.*, 410.
- See APPEAL, 16; DEEDS, 6; EMINENT DOMAIN, 2; ESTOPPEL, 1; FRAUDULENT CONVEYANCES, 4, 8; HOMESTEAD, 3, 5; HUSBAND AND WIFE, 7; INTERVENTION, 3; JOINT LIABILITY, 4, 5; JUSTICES OF THE PEACE; LIMITATIONS OF ACTIONS, 2; MECHANICS' LIENS, 6; MERGER; PARTNERSHIP, 6, 7; PLEADING, 4, 5; TRIAL, 4; SURETYSHIP.

JURISDICTION.

1. **SUITS AFFECTING PROPERTY IN ANOTHER STATE.**—Suit in equity may be maintained, and remedies granted which effect and operate upon the person of defendant, and not upon the subject matter when it is situated in another state or country, but the parties are within the jurisdiction of the court, although such subject matter is referred to in the decree, and the defendant is ordered to do, or to refrain from doing, certain acts towards it, and it is thus ultimately but indirectly effected by the relief granted. *Allen v. Buchanan*, 187.

2. **A STATE MAY EXERCISE JURISDICTION OVER NAVIGABLE WATERS WITHIN ITS LIMITS**, and subject persons and property thereon to the civil and criminal jurisdiction of its courts, in the absence of any prohibition in the national constitution or laws. *People v. Welch*, 793.
3. **CONSTITUTIONAL LAW**.—An act of Congress declaring that every person employed on any steamboat or vessel, by whose misconduct, or negligence, or inattention to his duties on such vessel the life of any person shall be destroyed, shall be deemed guilty of manslaughter, is within the power of Congress, under the grant to it of the power to regulate commerce with foreign nations and among the several states, and the grant of judicial power in cases of admiralty and maritime jurisdiction. *People v. Welch*, 793.
4. **CONSTITUTIONAL LAW**.—THE POWER TO REGULATE COMMERCE extends to the persons who conduct navigation, as well as to the instruments used, and the courts of the United States may be invested by Congress with jurisdiction over offenses committed upon the waters within the admiralty jurisdiction. *People v. Welch*, 793.
5. **CONSTITUTIONAL LAW—JURISDICTION OF STATE COURTS, WHEN EXCLUDED BY THE ACTION OF CONGRESS**.—Wherever it is within the power of Congress to legislate, it is competent for it to exclude the jurisdiction of the state courts in respect to all subjects over which legislative action is authorized. To exclude the jurisdiction of the state courts over matters within their ordinary jurisdiction, the intention of Congress to exercise this power should be distinctly manifested, and the legislation relied upon should be clear and unambiguous. There must be express words of exclusion or a manifest repugnancy to the exercise of state authority over the subject. *People v. Welch*, 793.
6. **STATE AND FEDERAL COURTS**.—When a legal right arises, and the state court is competent to administer justice, the right may be asserted in that court, although the federal court may have jurisdiction of the same question, subject, however, to the proviso that there is no law limiting jurisdiction to the federal courts. *Raisler v. Oliver*, 213.
7. **CRIMINAL LAW—JURISDICTION CONCURRENT IN THE STATE AND NATIONAL COURTS**.—An act of Congress making punishable as manslaughter the commission on vessels of certain acts already constituting that crime by the common law, and by the law of the state, does not exclude the jurisdiction of the state courts, to punish the offense under the state laws. *People v. Welch*, 793.

See ACCOUNTS; CRIMINAL LAW, 2; JUSTICES OF THE PEACE; STATES.

JURY AND JURORS.

See TRIAL, 6, 7, 10, 11.

JUSTICE OF THE PEACE.

JUSTICES' JUDGMENTS—JURISDICTION—PRESUMPTION.—If the facts touching the acquisition of jurisdiction are fully disclosed, judgments of justices of the peace, so far as collateral attack is concerned, are regarded no less favorably than those of courts having more extensive powers. *Leonard v. Sparks*, 646.

LABORERS.

See EXECUTION, 1.

INDEX.

LACHES.

See LIMITATIONS OF ACTIONS, 1; PAYMENT, 6.

LAKES.

See PUBLIC LANDS, 2; WATERS, 6.

LANDLORD AND TENANT.

1. REMAINING IN POSSESSION AFTER CONSTRUCTIVE EVICTION, EFFECT OF.—
A tenant is not obliged, upon the occurrence of the first neglect of duty on the part of the landlord which would justify a surrender of the premises, to elect immediately between an abandonment and a retention of the possession. Whether his omission to avail himself of his right to surrender was unreasonable under the circumstances is a question for the jury. *Minneapolis Co-operative Co. v. Williamson*, 473.
2. TENANT NOT LIABLE FOR RENT AFTER SURRENDER OF PREMISES, WHEN.
A tenant, who exercises an option which his lease gives him to continue his tenancy after the expiration of the term, cannot terminate his tenancy, at his mere election, before the end of the year, but is not liable for rent accruing after a surrender of the premises which is accepted by the landlord. *Minneapolis Co-operative Co. v. Williamson*, 473.
3. ACTION FOR RENT—DEFENSES NOT INCONSISTENT.—In an action for rent, an answer alleging that the landlord accepted the tenant's surrender of the premises and resumed possession, and also that the tenant abandoned the premises because of their untenable condition, is not open to the objection that it embodies inconsistent defenses. *Minneapolis Co-operative Co. v. Williamson*, 473.

See PARTITION, 2.

LARCENY.

POSSESSION OF STOLEN PROPERTY AS EVIDENCE OF GUILT.—The late possession of stolen property alone is not sufficient to sustain a verdict of guilt of larceny, but it is a circumstance tending to show guilt. An instruction embodying this proposition is not open to the objection that it charges upon matters of fact. *State v. Duncan*, 888.

LEASE.

See PARTITION, 2; PARTNERSHIP, 2.

LEGISLATURE.

See STATUTES; TAXES.

LETTERS.

See CONTRACTS, 9; EVIDENCE, 7.

LEVY.

See EXECUTION.

LEX FORI.

See CONFLICT OF LAWS, 1.

LEX LOCI.

See CONTRACTS, 3.

LIBEL.

1. **IMPLIED MALICE.**—Every willful and unauthorized publication, imputing to a merchant or business man conduct which is injurious to his character and standing as a merchant or business man, is a libel, and implies malice. *Mitchell v. Bradstreet Co.*, 592.
2. **BY MERCANTILE AGENCY.**—A false and voluntary publication by a commercial agency that a business firm has assigned, sent to all the subscribers of such agency regardless of their location or interest in the financial standing of the firm, is not privileged, though published without malice; especially when such agency is requested to retract the statement and refuses to do so. *Mitchell v. Bradstreet Co.*, 592.
3. **EVIDENCE OF LOSS OF CUSTOM** as an element of damage after a libelous publication by a mercantile agency is admissible under an allegation in the petition that "the publication is a libel on plaintiffs' good name and credit, and that by reason thereof they were forced to suspend business to their damage" in a designated amount. *Mitchell v. Bradstreet Co.*, 592.
4. **EVIDENCE.**—In an action against a mercantile agency for a libelous publication, evidence is admissible by its subscribers who are also creditors of plaintiff to show the fact of publication, when the answer admits that if made, such publication was in the usual course of business. *Mitchell v. Bradstreet Co.*, 592.
5. **WORDS CHARGING INSOLVENCY—ACTIONABLE PER SE.**—A false publication by a mercantile agency that a business firm has assigned is actionable *per se*, and malice is implied therefrom. *Mitchell v. Bradstreet Co.*, 592.
6. **CHARGING INSOLVENCY—DAMAGES.**—In an action of libel against a mercantile agency for a false publication that a business firm has assigned, it is entitled to recover large damages upon proof of the falsity of the publication, and that it was doing a large and lucrative business, principally upon credit, and that the publication compelled it to retire therefrom, and almost entirely destroyed its credit. *Mitchell v. Bradstreet Co.*, 592.
7. **SPECIAL DAMAGES** when claimed in an action for libel must be alleged and proved as in any other case. *Mitchell v. Bradstreet Co.*, 592.
8. **DIRECTING VERDICT.**—If, in an action for libel, the publication in dispute sent out by a mercantile agency is libelous *per se* as to all other persons to whom it is sent, except as to creditors of the plaintiff, the jury is properly instructed to find for the plaintiff. The only question for consideration is the amount of damages that plaintiff is entitled to recover. *Mitchell v. Bradstreet Co.*, 592.

See **APPEAL**, 2; **MUNICIPAL CORPORATIONS**, 4.

LICENSE.

1. **LICENSE TO OCCUPY LAND, NOT BINDING ON PURCHASER WHEN.**—A license to a railroad company to enter and occupy land is a protection for any acts done under it, but a sale of the land constitutes a revocation of the license, and the vendee is entitled immediately after the transfer to bring his action to recover possession of the strip so occupied. *Kremer v. Chicago etc. Ry. Co.*, 468.
2. **RAILROAD COMPANIES OCCUPYING LAND UNDER LICENSE, WHEN DENIED TRESPASSERS.**—The entry and occupation of land by a railroad, and the

construction of its road, under a license from the landowner, does not operate as an appropriation of the land so occupied, nor divest the title of the landowner. That title passes to a purchaser of the premises, and as to him the railroad company is a naked trespasser. *Kremer v. Chicago etc. Ry. Co.*, 468.

See RAILROADS, 6.

LIENS.

1. A LIEN CAN GENERALLY BE CREATED ONLY BY THE OWNER OF PROPERTY or by some person by him authorized. Hence, one having possession of a horse under an agreement to purchase by which the vendor retains title until such payment is made, cannot, as against the vendor, create a lien for its board and care. *Lowe v. Woods*, 301.
2. LIEN OF STABLE-KEEPER for the board and keeping of horses intrusted to him does not exist when the person making the contract for such board and care is not the owner, though the statute declares that livery or boarding or feed stable proprietors, and persons pasturing horses or stock have a lien dependent on possession for their compensation in caring for, boarding, feeding, or pasturing such horses or stock. The rule of *caveat emptor* applies against the lien claimant. *Lowe v. Woods*, 301.

See ATTACHMENT, 1; BONDS; CHATTEL MORTGAGES; DEEDS, 7; EXECUTION, 6; INNKEEPERS, 2; MECHANICS' LIENS; VENDOR AND PURCHASER, 17, 18.

LIMITATIONS OF ACTIONS.

1. LIMITATIONS OF ACTIONS—EFFECT OF LAPSE OF TIME.—A plaintiff's right to avail himself of a legal remedy is not impaired merely by inaction or delay in seeking that remedy. *Kremer v. Chicago etc. Ry. Co.*, 468.
2. STATUTE OF LIMITATIONS IN AN ACTION TO SUBJECT PROPERTY FRAUDULENTLY CONVEYED to the payment of plaintiff's judgment does not begin to run at the date of such conveyance, but only on the recovery of the judgment, because, until it was obtained, plaintiff had no cause of action. *Brown v. Campbell*, 314.
3. FRAUD.—In cases of fraud the bar of the statute of limitations begins to run only from the date of the discovery of the fraud. *Connecticut etc. Ins. Co. v. Smith*, 656.
4. NEW PROMISE.—A receipt stating that the person signing it had, at various times, received of another person, designated therein, a sum of money also designated, "which is hereby acknowledged," is an unqualified acknowledgment of the debt as existing, and therefore constitutes a new promise sufficient to take the debt out of the statute of limitations. *Custy v. Donlan*, 419.
5. A NEW PROMISE is implied from a general unqualified acknowledgment of a debt. *Custy v. Donlan*, 419.

See TRUSTS, 7.

LODGERS.

See INNKEEPERS.

MALICE.

See LIBEL, 1, 5.

MALICIOUS PROSECUTION.

1. **PROBABLE CAUSE—BURDEN OF PROOF.**—If one accused of crime is discharged by the examining magistrate and brings an action for malicious prosecution against the prosecutor the burden of proving probable cause is on the latter. *Barhight v. Tammany*, 853.
2. **MALICE AND PROBABLE CAUSE WHEN QUESTION FOR JURY.**—If in an action for malicious prosecution plaintiff's evidence shows malice and want of probable cause, while defendant's evidence shows directly the contrary, the jurymen are the sole judges of the credibility to be attached to the evidence as introduced, and they should be so instructed by the court. *Barhight v. Tammany*, 853.
3. **ADVICE OF COUNSEL** which constitutes a defense to an action for malicious prosecution must rest on an honest and full presentation to counsel of all the facts within the knowledge of the prosecutor, or which he has reasonable ground for believing he is able to prove. An incomplete and unfair statement warrants an inference that the advice was sought as a mere cover for the prosecution, and an opinion based on such statement is an unsatisfactory reply to evidence of malice and want of probable cause. *Barhight v. Tammany*, 853.
4. **LEGAL ADVICE AS DEFENSE.**—Legal advice sought, received, and acted upon, after a truthful and fair statement of the facts as understood by the prosecutor, is a defense to an action for malicious prosecution. It is available when the plaintiff has made a *prima facie* case of malice and want of probable cause, but it is an affirmative defense, and the burden of proving it is on the defendant. *Barhight v. Tammany*, 853.
5. **ADVICE OF COUNSEL AS DEFENSE.**—Any evasion or concealment by the prosecutor in his statement of the case to his counsel upon which the prosecution is founded, or any failure on his part to make a full disclosure of the facts within his knowledge concerning it, deprives him of the protection which legal advice founded upon an honest, fair, and full presentation of the case affords when he is sued for malicious prosecution. *Barhight v. Tammany*, 853.

MALPRACTICE.

See JUDGMENTS, 15; PHYSICIANS AND SURGEONS, 6; WITNESSES, 7.

MANSLAUGHTER.

See HOMICIDE, 1, 7.

MANUFACTURING CORPORATIONS.

ELECTRIC COMPANIES DEEMED TO BE.—A corporation engaged in generating, storing, transmitting, and selling electricity is a manufacturing corporation within the purview of the section of the Alabama code (1565) which authorizes the consolidation of corporations of that character. *Beggs v. Edison Electric etc. Co.*, 94.

See CORPORATIONS, 9.

MARRIAGE AND DIVORCE.

1. **SUFFICIENCY OF COMPLAINT IN DIVORCE—SURPLUSAGE.**—If a complaint in an action for divorce stating a good cause of action sustained by the evidence, also contains additional matter which makes it inconsistent in its terms, and therefore demurrable, it should be amended by strik-

- ing out such inconsistent matter as surplusage, and thereupon a divorce should be decreed. *Heilbron v. Heilbron*, 845.
2. **CRUELTY—EVIDENCE TO SUSTAIN.**—A complaint in an action for divorce by a husband against his wife for cruel and barbarous treatment is sustained by her admissions on cross-examination that she broke the glass door of her husband's store, interfered with his customers, broke dishes and threw them downstairs, threw hot water on the hired girl, and on two occasions, when her stepsons complained of dinner, brought in sloop and threw it on the table. *Heilbron v. Heilbron*, 845.
 3. **ALIMONY—PENDENTE LITE.**—An order of the court of quarter sessions in an action for divorce requiring the libelant to pay for the support of his wife, does not prevent the court of common pleas from decreeing alimony *pendente lite*. Both orders may run concurrently during the pendency of the proceedings, but when the common pleas has awarded a divorce, with or without alimony, the jurisdiction of the quarter sessions ends. *Heilbron v. Heilbron*, 845.
 4. **ALIMONY.**—Under a petition for alimony *pendente lite*, the court in dismissing the action, cannot require alimony to be paid until the further order of the court. The order must be limited to the pendency of the suit. *Heilbron v. Heilbron*, 845.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. **RELATION OF, WHEN EXISTS.**—A teamster hired to haul coal in his own wagon for a fuel company occupies the position of a servant, when he represents the company in all the details of the work assigned to him, and is subject to its control as long as his employment continues. Under such circumstances, it is immaterial that he is paid for his work by the load, and not by the day or hour. *Waters v. Pioneer Fuel Co.*, 564.
2. **TEAMSTER, WHEN ACTING WITHIN THE SCOPE OF HIS DUTIES.**—When a teamster, hired to haul coal for a fuel company, has the cover of a coal-hole in a sidewalk removed for the purpose of delivering a load of coal, it is one of his duties, as a servant of the company, to see that the cover is securely replaced, or the hole otherwise protected until the occupant of the premises can attend to the matter, and if, owing to his failure to perform that duty properly, the cover gives way under a person using the sidewalk, the company is liable for the injuries thereby sustained. *Waters v. Pioneer Fuel Co.*, 564.
3. **WHO OCCUPY RELATION OF.**—The attendants at a bath-house, if selected and subject to be discharged by the owner, and performing services for him in keeping the bathrooms and the adjacent halls clean, comfortable, and properly heated, are his servants, for whose conduct or negligence he is answerable to his patrons, though they, and not he, pay such attendants all the compensation they receive, and the attendants when performing services for patrons are under their immediate control. *Gaines v. Bard*, 266.
4. **THE PAYMENT OR PROMISE OF WAGES IS NOT ESSENTIAL** to the existence of the relation of master and servant. *Gaines v. Bard*, 266.
5. **SCOPE OF EMPLOYMENT—QUESTION OF FACT.**—Whether or not the act of a servant for which it is sought in a particular case to hold the

master liable was done in the execution of the master's business within the scope of the employment is in most cases a question of fact. *Ritchie v. Waller*, 361.

6. **COURSE OF EMPLOYMENT—DEVIATION BY SERVANT—LIABILITY OF MASTER.**—A farm laborer who, under orders from his master, proceeds with a team and wagon to a brewery some distance from the farm and procures a load of manure without any directions from his master as to the route to be taken in going or coming, and who in returning deviates from the usual route and stops to attend to business of his own, leaving the team unhitched in the highway, is still acting in the execution of the master's business and within the scope of his employment so as to make the master liable for injury to the property or person of a third party, caused by the running away of the team while the servant is thus engaged in the transaction of his own business. *Ritchie v. Waller*, 361.
7. **DEVIATION BY SERVANT—LIABILITY OF MASTER—QUESTION OF LAW OR FACT.**—In most cases when the question of the master's responsibility turns principally upon the mere extent of deviation by the servant from the strict course of his employment or duty, such question is generally one of fact and not of law, and must depend upon the extent of deviation and all the attendant circumstances. When the deviation is slight and not unusual the court may, as a matter of law, determine that the servant was still executing his master's business, or if the deviation is very marked and unusual the court in like manner may determine that the servant was not on the master's business but on his own, relieving the master from liability. Cases falling between these extremes are regarded as involving merely a question of fact to be left to the jury or other trier of these questions. *Ritchie v. Waller*, 361.
8. **DEVIATION BY SERVANT FROM COURSE OF EMPLOYMENT—LIABILITY OF MASTER.**—In cases of deviation, a mere departure by the servant from the strict course of his duty, even for a purpose of his own, does not in and of itself constitute such a departure from the master's business as to relieve him of responsibility. *Ritchie v. Waller*, 361.
9. **DEVIATION OF SERVANT FROM COURSE OF EMPLOYMENT—LIABILITY OF MASTER.**—If a servant, while deviating from the strict line of his employment, is really engaged in the execution of the master's business it is immaterial that he joins with this some private business or purpose of his own, and the master is still liable, but if the servant, during such deviation, is on a frolic of his own, without being at all on his master's business, the latter is not liable. *Ritchie v. Waller*, 361.
10. **DAMAGES FOR THE WRONGFUL DISCHARGE BY AN EMPLOYER OF AN EMPLOYEE** before the contract of service has terminated are, if an action is brought after the expiration of the term specified in the contract, presumed to be the contract price, and the burden is upon the defendant to rebut this presumption by proof that the damages sustained were actually less. *Gates v. School District*, 249.
11. **THE DAMAGES RECOVERABLE FOR THE WRONGFUL DISCHARGE OF AN EMPLOYEE** cannot be reduced by showing that because of such discharge he removed to another part of the country, where the living expenses of himself and family were less than in the locality where he had been employed. *Gates v. School District*, 249.
12. **THE DAMAGES RECOVERABLE FOR A WRONGFUL DISCHARGE** of an employee may be reduced by proving that, after such discharge, he performed work on his own account, in his own business, incompatible

with the performance of the service stipulated to be performed in the violated contract. *Gates v. School District*, 249.

23. **THE DUTIES WHICH AN EMPLOYER OWES** to his employees are to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in order, to exercise ordinary care in the selection and retention of competent servants to properly conduct the business in which the servant is employed, and to make such provision for the safety of the employees as will reasonably protect them against the dangers incident to their employment. *Elledge v. National City etc. Ry. Co.*, 290.
24. **DANGEROUS PLACE IN WHICH TO WORK.**—If a workman is put to work alongside a cliff or embankment of stone which he believes to be solid and secure, but which the foreman knows to be insecure and dangerous, and injury is suffered by the workman, the master is answerable, because it is his duty to furnish his employees a reasonably safe place in which to work. *Elledge v. National City etc. Ry. Co.*, 290.
25. **NEGLIGENCE—FELLOW-SERVANTS.**—A master is not liable for an injury inflicted upon a servant through the negligence of a fellow-servant. *Alabama etc. R. R. Co. v. Carroll*, 163.
26. **NEGLIGENCE—FELLOW-SERVANTS.**—Car inspectors and trainmen are fellow-servants. *Alabama etc. R. R. Co. v. Carroll*, 163.
27. **A MASTER IS NOT RESPONSIBLE FOR THE NEGLIGENCE OF HIS SUPERIOR SERVANT** in giving orders whereby injury is sustained by an inferior servant. *Moody v. Hamilton Mfg. Co.*, 396.
28. **VICE-PRINCIPAL.**—If a master owes a duty to his servants, and deposes the performance of that duty to another servant, then the latter is the representative of the master, who is chargeable with his knowledge, and his negligence in not performing such duty to another employee or servant is the negligence of the master, for which he is answerable. *Elledge v. National City etc. Ry. Co.*, 290.

See EVIDENCE, 9; POSTOFFICES, 3.

MATERIALMEN.

See MECHANICS' LIENS, 5.

MAYOR.

See MUNICIPAL CORPORATIONS, 3.

MECHANICS' LIENS.

1. **INFANTS, LANDS OF, NOT SUBJECT TO MECHANIC'S LIEN.**—There can be no mechanic's lien on the lands of a minor whether he represents himself to be of full age or not, and if a materialman bases his claims upon the ratification of a contract out of which a lien might arise, he must prove that the landowner has intentionally acknowledged the obligation of the contract, after the attainment of his majority. To establish such a ratification, it is not sufficient to show that he has retained the property and collected the rents therefrom. *Bloomer v. Nolan*, 690.
2. **THE DESCRIPTION OF A BUILDING** in the notice of a mechanic's lien is sufficient if it enables a person familiar with the locality to identify the building as the only one corresponding with such description. *Hughes v. Torgerson*, 105.
3. **NOTICE OF LIEN—ERROR IN THE NAME OF THE OWNER.**—The description of a building in the notice of a mechanic's lien is not rendered

insufficient by the fact that the building is stated to be the property of a person who was no longer alive when the notice was filed. *Hughes v. Torgerson*, 105.

4. **ARCHITECTS, WHEN WITHIN THE PROTECTION OF THE STATUTE.**—An architect who prepares the drawings, plans, and specifications for a building, and superintends the erection thereof, is within the protection of a statute which creates a lien in favor of “every mechanic, or other person who shall do or perform any work or labor upon . . . any building, or improvement on land.” *Hughes v. Torgerson*, 105.
5. **MATERIALMAN MUST PROVE CONTRACT WITH LANDOWNER.**—To entitle a materialman to recover under the provisions of the mechanic’s lien laws, it is not enough to prove the furnishing of the material for which the lien is claimed, and the due filing of the verified account thereof. He must also show that the material was furnished in pursuance of an agreement, express or implied, with the owner or his agent. *Bloomer v. Nolan*, 690.
6. **SUITS TO ENFORCE—NECESSARY PARTIES DEFENDANT.**—Judgment for the plaintiff in a suit to enforce a mechanic’s lien must be reversed for want of the necessary parties defendant, if the only defendant in the suit was the administrator of a deceased owner of the property subject to the lien. *Hughes v. Torgerson*, 105.
7. **MECHANICS’ LIENS—PARTIES—PLEADING.**—In an action to enforce a mechanic’s lien against the property of an insolvent owner, a complaint merely alleging that a third person, not described as assignee of the insolvent, has, or claims, some interest in the property, must be interpreted as directed against such assignee’s interest in his personal capacity, and is not sufficient to make the insolvent estate a party to the action. *Quinby v. Slipper*, 899.

See **ASSIGNMENT FOR THE BENEFIT OF CREDITORS; INJUNCTION, 2; JUDGMENTS, 13.**

MEMORANDUM.

See **VENDOR AND PURCHASER, 9-12.**

MENTAL ANGUISH.

See **DAMAGES, 1; TELEGRAPH COMPANIES.**

MERCANTILE AGENCIES.

See **LIBEL, 2-6.**

MERGER.

- ▲ **JUDGMENT AGAINST ONE OF SEVERAL JOINT DEBTORS MERGES** the original debt into the higher security of the judgment, and no action can thereafter be maintained against any of the other debtors, even though no satisfaction is received over the judgment. *Russell v. McCall*, 807.

See **JUDGMENTS, 6, 7.**

MINORS.

See **INFANTS.**

MISDEMEANORS.

See **STATUTES, 6.**

MISFEASANCES.

See OFFICERS, 1, 2.

MORTGAGES.

1. **REISSUE OF.**—If the note secured by a mortgage of chattels is fully satisfied, but subsequently the mortgagor procures a new loan of the mortgage and reissues the note and redelivers the mortgage to him with an oral agreement that all the written privileges and powers contained in the mortgage shall be revived for the purpose of securing this loan; this transaction does not vest in the mortgagee any title to the goods mortgaged, there being no delivery of such goods to him. Especially is this true where the second loan is for a different amount from the first, and the mortgage was executed both by the mortgagor and his wife, and the oral agreement was made by him alone. *Douglas v. Stetson*, 442.
2. **MORTGAGE TO SECURE DIFFERENT NOTES—PRIORITIES.**—An assignment to different persons of notes secured by the same mortgage, but made payable at different dates, either with or without an accompanying assignment of the mortgage, does not entitle the holder of the note first coming due to any prior right to the proceeds of a foreclosure sale of the mortgaged premises. On the contrary, all the assignees are entitled to share *pro rata* in the proceeds of the mortgaged premises. *First Nat. Bank v. Andrews*, 885.
3. **STIPULATION FOR ATTORNEYS' FEES IF SUIT IS BROUGHT, EFFECT OF.**—The mere bringing of a suit on a mortgage contract does not, without further proof, authorize the recovery of attorneys' fees which the mortgagor has stipulated to pay in the event of the claims being placed in the hands of an attorney for collection. Such fees cannot be recovered if the debt is paid before suit is brought. *Boyd v. Jones*, 100.
4. **ASSIGNMENT OF A MORTGAGE**, in order to transfer the entire legal and equitable interest of the mortgagee, must be by deed containing such words of grant as show an intention of the parties to make a complete transfer. When a formal assignment is thus made, and the bond, note, or other evidence of the debt is assigned and delivered, the assignee is invested not only with the legal title but also with any power of sale contained in the mortgage. *Lanier v. McIntosh*, 676.
5. **EQUITABLE ASSIGNMENT.**—A sale of mortgaged premises, which is ineffective on account of defects in the execution of the power, operates as an equitable assignment of the mortgage to a purchaser if he pays the purchase money in good faith, and it is applied to the satisfaction of the mortgage debt. *Lanier v. McIntosh*, 676.
6. **EQUITABLE ASSIGNMENT.**—The mere assignment of the mortgage debt carries with it the mortgage as an incident, and may be enforced by the assignee in his own name, and an equitable assignment is declared and enforced, by way of subrogation, whenever right and justice require it. *Lanier v. McIntosh*, 676.
7. **FORECLOSURE—OUTSTANDING TITLE—EJECTMENT.**—A mere right of redemption in a third person after foreclosure of a mortgage is not such an outstanding title as defeats a recovery in ejectment. The outstanding title in such case must be such a one as the owner thereof could recover on if he were asserting it in an action. *Lanier v. McIntosh*, 676.
8. **DEFECTIVE SALE UNDER POWER—EFFECT OF ON PURCHASER.**—A sale and conveyance of mortgaged premises, by a mortgagee or trustee acting under a power, though defectively executed, passes the legal title and

estate to the purchaser subject to the right of redemption. In such case the title passes by a conveyance of the property by the person holding such title. *Lanier v. McIntosh*, 676.

9. **DEFECTIVE FORECLOSURE SALE—ESTOPPEL TO ATTACK.**—A mortgagor who accepts the surplus arising from a defective foreclosure sale of mortgaged land, and contracts with the purchaser for him to hold the title as security for the money advanced and to reconvey upon being reimbursed therefor, is estopped from attacking the validity of the sale. *Lanier v. McIntosh*, 676.
 10. **DEFECTIVE FORECLOSURE—RESALE.**—Entry of record of satisfaction of a mortgage made by the mortgagee after foreclosure, under the mistaken belief that the foreclosure sale has effectually foreclosed the mortgage, is not conclusive on the purchaser who has paid the purchase money, but he may show by parol that no title passed at such sale and may have a resale to correct the error. *Lanier v. McIntosh*, 676.
 11. **JUDGMENT BY DEFAULT IN FORECLOSURE SUIT HOW FAR AN ESTOPPEL.** A default by a junior mortgagee, against whom relief is sought in foreclosure proceedings, under an allegation that he has some unknown interest in the premises, which it is prayed that he may be compelled to set up, or be forever debarred from asserting, is merely an admission that the plaintiff in such proceedings has a good cause of action, and will not estop the junior mortgagee from subsequently enforcing his own lien in a suit against the mortgagor. *Lincoln Nat. Bank v. Virgin*, 747.
- See **BANKS**, 8; **BONDS**; **CHATTEL MORTGAGES**; **CONFLICT OF LAWS**, 1; **CONTRACTS**, 2; **CORPORATIONS**, 19, 20; **DEBTOR AND CREDITOR**; **FORGERY**, 3-6; **FRAUDULENT CONVEYANCES**, 2, 3; **HUSBAND AND WIFE**, 5; **INSOLVENCY**, 2; **JUDGMENTS**, 13; **TENDER**, 2.

MUNICIPAL CORPORATIONS.

1. **POWER TO LAY OUT NEW STREETS OVER STATE TIDE LAND.**—A statute authorizing a city to "project or extend its streets over and across any tide lands within its corporate limits, and along or across the harbor areas of such city," does not authorize such city to lay out a new street over state tide lands, but only to extend streets already in existence. *Seattle etc. Ry. Co. v. State*, 866.
2. **EMPLOYMENT OF SPECIAL COUNSEL—LIABILITY OF CITY.**—The employment of special counsel by the mayor of a city to defend him in *mandamus* proceedings to require him to sign an illegal issue of bonds, when the legislative and judicial departments of the city are arrayed against him, and refuse to furnish him with counsel, renders the city liable for the services of such special counsel, although their employment by the mayor was contrary to the city charter. *Wiley v. Seattle*, 905.
3. **POWER OF MAYOR TO EMPLOY SPECIAL COUNSEL.**—Although, as a general rule, the mayor of a city has no authority by virtue of his office to authorize litigation in behalf of the city, or to employ special counsel to represent him or it, yet cases of emergency may arise when such power must necessarily exist, though contrary to the charter provisions of the city. *Wiley v. Seattle*, 905.
4. **LIBEL.**—A TOWN IS NOT ANSWERABLE FOR A LIBEL referred to in an account or contained in any report of a committee accepted by it. No action lies, because what is done by a town is done as a political body, and as a part of the administration of the government. *Howland v. Inhabitants*, 445.

5. **CONTRACTORS WHEN NOT LIABLE FOR CONTINUING INJURIES TO RIPARIAN PROPRIETORS.**—If contractors by constructing a conduit for a city thereby drain off a pond on the land of a third person, and the operation of the conduit after its construction is to keep draining off such waters, such contractors are not answerable for the damages resulting from the maintenance of the conduit, it being on the lands of the city, of which they have no control, and the draining off of the waters being a result not reasonably to be anticipated from the acts of the contractors. *Covert v. Cranford*, 826.
6. **MUNICIPAL LIABILITY FOR SEWERS.**—If the duty of keeping sewers repaired rests on a municipality, it is answerable to a property-owner who has constructed a cellar under a sidewalk for injuries received by the escape of odors and other noxious contents of the sewer into such cellar; nor can the city escape liability on the ground that the power to fix the location and prescribe the plan of sewers rests with the board of aldermen, if such board had not exercised that power. *Allen v. Boston*, 423.
7. **A MUNICIPALITY IS NOT EXONERATED FROM LIABILITY** for injuries suffered by a property-owner from its negligence respecting a sewer on the ground that his premises were not directly connected with the sewer, and he was not liable to be assessed for the expense thereof. *Allen v. Boston*, 423.
8. **THE DAMAGES RECOVERABLE FROM A CITY FOR ITS NEGLIGENCE** in respect to a sewer may include compensation for injuries to plaintiff's health and business, as well as injury to his property. *Allen v. Boston*, 423.

See JUDGMENTS, 8-11; OFFICERS, 2; WATERS, 5.

MURDER.

See HOMICIDE.

NAVIGATION.

See JURISDICTION, 2-4; WATERS, 2, 6.

NECESSARIES.

See HUSBAND AND WIFE, 8; SUBROGATION, 2.

NEGLIGENCE.

1. **NEGLIGENCE IS USUALLY A MIXED QUESTION OF LAW AND FACT**, and is never purely one of law unless the facts are wholly undisputed and admit of no conflicting inferences. *Isham v. Post*, 766.
2. **NEGLIGENCE—PRESUMPTION OF.**—Injury to a passenger in consequence of something done or not done by the carrier or his employees, or connected with the appliances of transportation, raises a presumption of negligence which the carrier is required to rebut. *Fleming v. Pittsburgh etc. Ry.*, 835.
3. **PROXIMATE CAUSE.**—Persons who perpetrate torts are responsible only for the proximate consequences thereof. *Western Ry. v. Mutch*, 179.
4. **PROXIMATE CAUSE.**—Proximate cause is that which is a natural and continuous sequence, unbroken by any efficient, intervening cause, pro-

ducing the result complained of, and without which that result would not have occurred. *Western Ry. v. Mutch*, 179.

5. **A WRONGDOER AND TRESPASSER CANNOT RECOVER FOR INJURIES** which are the joint consequence of his own wrong and the negligence of another, and this remains true, though the person injured is a child, and only does what children of his age and intelligence may reasonably be expected to do. *Gay v. Essex etc. Ry.*, 415.

6. **CONFLICT OF LAWS—RECOVERY FOR INJURY RECEIVED IN ANOTHER STATE.**—There can be no recovery in one state for injury received through negligence in another, unless the infliction of the injury is actionable under the law of the state where it is sustained. *Alabama etc. R. R. Co. v. Carroll*, 163.

7. **RECOVERY FOR INJURY RECEIVED IN ANOTHER STATE.**—Although the negligence, which is the proximate cause of injury inflicted by one fellow-servant upon another, occurs in one state, while the injury is received in another, there can be no recovery for such injury in the former state based on its laws, unless a right of action for the injury is given by the laws of the latter. *Alabama etc. R. R. Co. v. Carroll*, 163.

8. **CONFLICT OF LAWS—EXTRATERRITORIAL OPERATION OF STATUTE.**—The law of a state in which a railroad brakeman is injured through the negligence of a fellow-servant determines his right to recover, although that law is opposed to the law of another state in which the negligence occurs, and which is also the domicile of the parties and the place in which the contract of employment is made. If he cannot maintain an action for the injury in the former state he cannot recover in the latter. *Alabama etc. R. R. Co. v. Carroll*, 163.

9. **INFANTS OF TENDER YEARS AND WANTING IN DISCRETION** are not amenable to the disabling effects of contributory negligence. *Western Ry. v. Mutch*, 179.

10. **CONTRIBUTORY NEGLIGENCE IS NO DEFENSE** to injuries which result from gross negligence. *Western Ry. v. Mutch*, 179.

See **BAILMENTS**; **BANKS**, 3-5; **CARRIERS**, 2; **CONFLICT OF LAWS**, 2; **MASTER AND SERVANT**, 16-18; **MUNICIPAL CORPORATIONS**, 7, 8; **NEGOTIABLE INSTRUMENTS**; **PHYSICIANS AND SURGEONS**, 5; **POSTOFFICES**, 1, 2, 4; **RAILROADS**, 9-12, 16, 20-22; **REAL PROPERTY**, 3, 6; **SEARCHERS OF RECORDS**.

NEGOTIABLE INSTRUMENTS.

FRAUD IN INCEPTION OF NOTE NO DEFENSE IN ACTION BY INDORSER, WHEN.

One who voluntarily signs an instrument which he knows to be a promissory note of some kind, relying wholly upon the statements of the party opposed to him in the contract as to its nature, and without informing himself of its contents, is guilty of such negligence as will preclude him from availing himself, in action on the note by a *bona fide* indorsee for value, of the defense that his signature was obtained by false and fraudulent representations as to the character of the obligation. *Ward v. Johnson*, 515.

See **CORPORATIONS**, 5-10; **EVIDENCE**, 5, 6; **INTEREST**; **MORTGAGES**, 1, 2; **PAYMENT**, 2; **SURETYSHIP**; **TENDER**, 2.

NEW PROMISE.

See **LIMITATIONS OF ACTIONS**, 4, 5.

NEW TRIAL.

VERDICT AGAINST EVIDENCE.—That a verdict is papably against the evidence is good ground for a new trial. *Western Ry. v. Mutch*, 179.

See **APPEAL**.

NOTICE.

NOTICE MAY BE INFERRED FROM CIRCUMSTANCES and by reasonable inferences therefrom. *Connecticut etc. Ins. Co. v. Smith*, 656.

See **BROKERS**, 5, 7, 8; **CORPORATIONS**, 5-10; **EVIDENCE**, 11; **FRAUDULENT CONVEYANCES**, 5, 6; **JUDGMENTS**, 3, 9-11; **MECHANICS' LIENS**, 3; **PAYMENT**, 5; **PUBLIC LANDS**, 3-5; **SALES**, 1, 3; **VENDOR AND PURCHASER**, 18.

OFFICERS.

1. **LIABILITY OF COUNTY TREASURER FOR PAYING FORGED CERTIFICATES.**—

The failure of a county treasurer to satisfy himself of the genuineness of the indorsements upon certificates made payable to the order of the persons therein named is negligence, which, if the indorsements prove to have been forged, renders him liable for the loss suffered by the county, especially where the indorsee presenting such certificates for payment is a deputy clerk who had the opportunity of fraudulently issuing them, and has actually done so. Nor is the treasurer, in such a case, relieved of his liability by the fact that another officer is also answerable for the misfeasances of the deputy clerk. *Board of County Commrs. v. Nelson*, 492.

2. **PUBLIC AGENTS, MISFEASANCES OF, NO ESTOPPEL RAISED BY.**—The wrongful acts of the officers of a municipal corporation cannot create an estoppel against the corporation, the taxpayers, or the people. *Board of County Commrs. v. Nelson*, 492.3. **A PUBLIC OFFICE BECOMES VACANT UPON THE ABSENCE OF THE INCUMBENT FROM THE STATE** for more than sixty days, though such absence is made necessary by his health, if the statute declares that an officer shall in no case absent himself from the state for a period of more than sixty days, and that an office becomes vacant on the absence of an officer from the state, without permission of the legislature, beyond the period allowed by law. No official notice to the appointing power is required. It may therefore appoint an incumbent to fill the vacancy, but such appointment does not conclude the person whose office is to be filled from proving that the assumed cause of vacancy never, in fact, existed. *People v. Shorb*, 310.4. **OFFICERS DE JURE NOT ENTITLED TO SALARY ALREADY PAID TO OFFICERS DE FACTO.**—If an officer *de facto* has been paid the salary accruing during his incumbency of the office, the officer *de jure* cannot recover any compensation for the same period, although the payment to the officer *de facto* was made with full knowledge that the title to the office was in litigation. *State v. Milne*, 724.

OLOGRAPHIC.

See **WILLS**, 3.

OPINIONS.

See **WITNESSES**, 5, 6.

ORDINANCES.

See RAILROADS, 14, 15; REAL PROPERTY, 2.

PARENT AND CHILD.

1. CUSTODY OF CHILD.—A parent who has transferred the custody of his infant child by fair agreement, which has been acted upon to the manifest interest and welfare of the child, will not be permitted to reclaim its custody unless he can show that such change of custody will materially promote its moral and physical welfare. *Cunningham v. Barnes*, 57.
2. CONSIDERATIONS IN AWARDING CUSTODY OF CHILD.—The welfare of a child is the polar star by which the court is guided in awarding the custody as between contending parties, but the legal rights of the parent will be respected, because founded in nature and wisdom, unless they have been transferred or abandoned. *Cunningham v. Barnes*, 57.
3. AGREEMENT AS TO CUSTODY OF CHILD.—A father can by agreement surrender the custody of his infant child to another so as to make the custody of that other legal, and he cannot thereafter repudiate such agreement and regain the custody of his child, unless he can show a clear breach of the agreement, or abuse of the child. *Cunningham v. Barnes*, 57.
4. EARNINGS OF CHILD WHEN NOT LIABLE FOR PARENT'S DEBTS.—The fact that the minor son of an insolvent father labors on the separate estate of the wife, with the father's consent, for the maintenance of the family, does not render the products of such estate liable for the father's debts. *Trapnell v. Conklyn*, 30.
5. CHILD'S EARNINGS WHEN NOT LIABLE FOR PARENT'S DEBTS.—Although a minor son's services and earnings belong to his father, and are liable for his debts while he supports him, yet an insolvent father may emancipate his son, and the latter's earnings then belong to him, to dispose of as he pleases, free from the claim of the father's creditors. *Trapnell v. Conklyn*, 30.

See STATUTES, 5, 6.

PAROL.

See EVIDENCE, 6, 7; MORTGAGES, 10; PUBLIC LANDS, 6; VENDOR AND PURCHASER, 10.

PARTIES.

See CORPORATIONS, 15-18; MECHANICS' LIENS, 7; TRUSTS, 1.

PARTITION.

1. PARTITION IS MATTER OF RIGHT, and not of judicial discretion, and the only indispensable requisite to entitle the co-owner applying for partition to relief is that he shall show a clear legal title. *Ransom v. High*, 67.
2. PARTITION BY TENANT BASED ON ADVERSE TITLE.—A tenant in possession of land under a lease, who acquires an outstanding title to an undivided interest therein from a third person cannot maintain partition without having surrendered possession to the landlord. *Barlow v. Dakin*, 192.
3. PLEADING.—A bill in equity for partition naming the proper parties need not make any formal deraignment of title, or any deraignment further than is necessary to describe and locate the land, and to

show how the parties became co-owners, that they hold it together and undivided in certain proportions, and that they are entitled to partition. *Ransom v. High*, 67.

4. **COMMISSIONERS—REMOVAL.**—Commissioners appointed to make partition, although appointed in the absence of some of the parties, cannot be removed except for good and sufficient cause, unless by consent of all parties. *Ransom v. High*, 67.
5. **REPORT OF COMMISSIONERS—SETTING ASIDE.**—The report of commissioners to make partition may be set aside on the ground that they erred in making allotments, but will be confirmed unless the partition is based on wrong principles, or it is shown by a clear and decided preponderance of evidence that they have made a very unequal or unfair partition or allotment. *Ransom v. High*, 67.

PARTNERSHIP.

1. **PARTNERSHIP IS CREATED** only by contract, express or implied, and the burden of showing its existence is on him who alleges it. *Dunham v. Lovcrook*, 838.
2. **COTENANCY.**—An agreement between cotenants of an oil lease to drill an oil well on the leased premises, at the common cost of the cotenants, does not, as between them, create a partnership agreement. *Dunham v. Lovcrook*, 838.
3. **COTENANTS MAY BECOME PARTNERS** if they agree to assume that relation towards each other; but the law does not create that relation for them as the consequence of a course of conduct and dealing naturally referable to a relation already existing between them, making such a course of conduct to their common advantage. *Dunham v. Lovcrook*, 838.
4. **A SURVIVING PARTNER HAS THE LEGAL TITLE TO THE ASSETS OF THE FIRM**, and holds them as the legal owner, and not as trustee in the strict sense of that term. In equity, however, he is to be regarded to some extent as a trustee, and his duty is to pay the debts and dispose of the assets of the partnership for the benefit of himself and the estate of his deceased partner. *Russell v. McCall*, 807.
5. **A SURVIVING PARTNER MISAPPROPRIATING THE ASSETS OF THE FIRM, AND CONVERTING THEM TO HIS OWN USE**, is so far guilty of a breach of trust that a court of equity will, when called upon, intervene and give appropriate relief. *Russell v. McCall*, 807.
6. **JUDGMENT—MERGER.**—A JUDGMENT AGAINST A SURVIVING PARTNER for a sum found to be due from him to the representatives of his deceased co-partner does not make the partnership assets the absolute property of the survivor, free from any duty on his part regarding them, nor does it vest in him the legal right to convert those assets and apply them to his own use, or to transfer them to a mere volunteer free from all liability to the estate of the deceased partner. Until such judgment is satisfied, the surviving partner has no further or larger right to the assets than he had before it was entered. *Russell v. McCall*, 807.
7. **THE REPRESENTATIVE OF A DECEASED PARTNER SUING A PERSON** guilty of taking and misappropriating the assets of a firm is entitled to recover the full amount, regardless of any sum due from the partnership to a third person, or to one of the parties to the suit, and for which the defendant, against whom the judgment is entered, is not answerable. *Russell v. McCall*, 807.

See JOINT LIABILITY, 1; JUDGMENTS, 5, 6; TRUSTS, 2.

PARTY WALLS.

1. A PARTY WALL OR PARTITION WALL MEANS A SOLID WALL. *Normille v. Gill*, 441.
2. THE OWNER OF LAND IN BUILDING A PARTY WALL partly on his own land and partly on that lying adjacent has no right, against the objection of the adjacent owner, to leave openings in the walls for windows, to be used for his own convenience until such time as his neighbor shall build upon the adjacent land. *Normille v. Gill*, 441.

PASSES.

See DEEDS, 8, 9; RAILROADS, 11.

PATENTS.

See PUBLIC LANDS, 2-6; TRADEMARKS.

PAYMENT.

1. A CHECK on a bank is not payment unless by express contract it is so received. *Johnson-Brinkman Commission Co. v. Central Bank*, 615.
2. WHAT DOES NOT CONSTITUTE.—A mere direction by the maker of a note to his agent to apply thereon money which he has received and holds as such agent does not constitute a legal application of the money by reason of the fact that the same person is also the general agent of the payee of the note, unless there is evidence that he consented, expressly or impliedly, as the agent of such payee, to apply the money as directed. *Moore v. Norman*, 523.
3. EVIDENCE OF CONTENTS OF PRIVATE BOOK ENTRY BY A DECEASED PERSON of payments of money is inadmissible to prove such payments when neither the book nor a copy of the entry is produced, nor the book verified. *Bennett v. Bennett*, 47.
4. PAYMENTS, PROOF OF AS AGAINST THIRD PERSONS.—A written instrument signed by the heirs of a deceased debtor showing that they had received various sums from him, is not admissible to prove such payment as against his creditors or strangers. *Bennett v. Bennett*, 47.
5. SALES FOR CASH—PAYMENT—WAIVER OF AS AGAINST THIRD PARTY.—The giving of a worthless check by a purchaser of goods for cash is not payment, and does not pass the title, but a delivery of a bill of lading in such case by the vendor to the purchaser is such laches on the part of the former as estops him from claiming the property or its proceeds in the hands of a third person who is an innocent purchaser. If, however, such third person has notice of the terms of the sale and of the nonpayment of the purchase money, the original vendor is not thus estopped. *Johnson-Brinkman Commission Co. v. Central Bank*, 615.

See DEBTOR AND CREDITOR; DEEDS, 4; EVIDENCE, 5; INTEREST; SALES, 5, 6; SUBROGATION; TENDER, 2.

PERPETUITIES.

See CHARITIES, 2, 6.

PERSONAL PROPERTY.

See HOMESTEAD, 5; HUSBAND AND WIFE, 3, 4; SALES; TROVER.

PHYSICIANS AND SURGEONS.

1. **PHYSICIAN AND PATIENT—DUTIES OF AND RELATIONS BETWEEN.**—The employment of a physician to attend upon a sick person continues while the sickness lasts, and the relation of physician and patient continues unless it is ended by the consent of the parties, or revoked by the express dismissal of the physician; and the latter is bound to bestow such reasonable, ordinary care, skill and diligence, as physicians and surgeons in the same neighborhood, and in the same general line of practice, ordinarily have and exercise in like cases. Time and locality are to be taken into account. In the absence of special agreement his engagement is to attend the case as long as it requires attention, unless he gives notice of his intention to discontinue his visits, or is dismissed by the patient; and he is bound to exercise reasonable and ordinary care and skill in determining when his attendance should cease. The mere failure to effect a cure does not raise a presumption of want of proper care, skill, and diligence. It is the duty of the patient to co-operate with the physician, and to conform to his prescriptions and directions, and if he neglects to do so he cannot hold the physician liable. On the other hand, the patient may rely upon the directions of his physician, and incurs no liability in doing so. *Lawson v. Conaway*, 17.
2. **DISMISSAL OF.**—A patient may at any time discharge or dismiss his physician, and from that moment the physician is relieved from responsibility. *Lawson v. Conaway*, 17.
3. **DEGREE OF SKILL AND DILIGENCE REQUIRED OF.**—Physicians and surgeons by holding themselves out to the world as such impliedly contract that they possess the reasonable and ordinary qualification of their profession, and are under a duty to exercise reasonable and ordinary care, skill, and diligence. In determining what constitutes such skill and diligence, the test is that which physicians and surgeons in the same neighborhood and same line of practice ordinarily have and exercise in like cases at the time of the treatment. *Force v. Gregory*, 371.
4. **CARE AND SKILL REQUIRED OF.**—A surgeon employed professionally to treat an injury is bound to use in his treatment a reasonable, ordinary degree of care and skill of the profession in his community, but he does not undertake to use the highest degree of care or skill, nor, in the absence of a special agreement, to perform a cure. *Lawson v. Conaway*, 17.
5. **MALPRACTICE—SUFFICIENCY OF COMPLAINT.**—A complaint against a physician or surgeon charging that after having entered upon the treatment and cure of a patient he carelessly, negligently, and unskillfully conducted himself in that behalf, and that in consequence of such conduct the injury resulted, is sufficient to authorize a recovery for abandonment of his treatment by the surgeon. *Lawson v. Conaway*, 17.
6. **PHYSICIANS OF DIFFERENT SCHOOLS—ABILITY OF, HOW MEASURED.**—If a physician belonging to a certain particular and distinct school of medicine is sued for malpractice, his treatment is to be tested by the general doctrines of his school, and not by those of other and different schools of practice. *Force v. Gregory*, 371.
7. **PHYSICIANS OF DIFFERENT SCHOOLS—ABILITY AND TREATMENT OF, HOW TESTED.**—If a physician called to treat a patient adopts the treatment, not of one particular school in the abstract, but of his own particular school, which he publicly professes and practices, and is then sued for

malpractice, and the medical testimony offered by the plaintiff relates to treatment prescribed by a different school, such testimony must be weighed, not alone with regard to bias and prejudice influencing the testimony of witnesses, but with regard to bias or prejudice which might influence or incline the jury in favor of one school rather than the other, and the jury must be instructed not to judge by determining which school in their own view is best. *Force v. Gregory*, 371.

See JUDGMENTS, 15; WITNESSES, 7.

PLEADING.

1. **SUIT CANNOT BE BROUGHT ON ONE CAUSE OF ACTION** and recovery had on another. *Johnson-Brinkman Commission Co. v. Central Bank*, 615.
 2. **ESTOPPEL**.—A petition alleging that defendant, in disregard of plaintiff's rights, took certain wheat and converted it to his own use, and has the proceeds thereof in his possession and under his control equal to the value of such wheat, and that plaintiff has demanded the value of the wheat, is sufficient to support a verdict for money had and received, especially if the case is tried by both parties on that theory. *Johnson-Brinkman Commission Co. v. Central Bank*, 615.
 3. **DEMURRER TAKEN TO PART OF COMPLAINT ONLY, WHEN GOOD**.—One who intervenes in a suit in which there are several defendants, and in separate portions of his complaint sets out the facts upon which his claim for relief against each of them is based, cannot object that a demurrer by one of those defendants is bad because taken to a portion of the complaint only, when the portion to which it is directed embraces a statement of all the facts upon which the intervener founds his claim for relief against that particular defendant. *Seibert v. Minneapolis etc. Ry. Co.*, 530.
 4. **AN AMENDED ANSWER CANNOT BE FILED** after the entry of final judgment. *Connecticut etc. Ins. Co. v. Smith*, 656.
 5. **AMENDMENT OF PLEADING**.—A petition or complaint may be amended to conform to the facts proved at any time before the entry of final judgment. *Connecticut etc. Ins. Co. v. Smith*, 656.
 6. **WAIVER OF OBJECTION**.—An objection to an amended petition as being a departure from the original is waived by pleading over and going to trial without making objection. *Gelatt v. Ridge*, 683.
- See CREDITOR'S SUIT, 1; EVIDENCE, 5; INFORMATION, 1; MARRIAGE AND DIVORCE, 1, 2; MECHANICS' LIENS, 7; PHYSICIANS AND SURGEONS, 5; VENDOR AND PURCHASER, 2, 3.

POLICE POWER.

See STATUTES, 4-6.

POSSESSION.

See DEEDS, 3; HUSBAND AND WIFE, 10; LARCENY; LICENSE, 1; LIENS, 2; TROVER; VENDOR AND PURCHASER, 7-9, 11.

POSTMASTERS.

See POSTOFFICES, 2.

POSTOFFICES.

1. **POSTMASTERS AND DEPUTY POSTMASTERS ARE LIABLE** for losses and injuries caused by their own defaults and negligence. *Raisler v. Oliver*, 213.

- 2. POSTMASTERS—LIABILITY OF FOR NEGLIGENCE—BURDEN OF PROOF.**—The responsibility of a postmaster for money or letters received by him in his official capacity is not that of a common carrier, and proof that letters containing money were delivered to a postmaster for registration, or to his assistant in his presence and by his direction, and the loss of the letters and money, without more, is not sufficient to authorize recovery. The burden of proof is on plaintiff to show culpable negligence affirmatively, and such a state of facts as to authorize the jury to attribute the loss to such negligence. *Raisler v. Oliver*, 213.
- 3. POSTMASTERS—LIABILITY OF FOR NEGLIGENCE OF ASSISTANTS.**—A postmaster is not responsible for the defaults or misfeasances of his clerks or assistants appointed by him under express authority and under his control, unless it appears that he was negligent in not exercising proper care and prudence in the selection of competent and suitable persons to perform such duties, or unless he was himself negligent in failing to properly superintend such assistants in the performance of the particular acts or duties, the doing of which, or the omission to do which, caused the loss or injury. *Raisler v. Oliver*, 213.
- 4. POSTMASTERS—LIABILITY OF FOR NEGLIGENCE OF ASSISTANTS.**—A postmaster who employs a clerk or assistant independent of express authority, and who pays him out of his own salary or means, is liable for his default or misfeasance, as any private person would be for the act of his agent or employee. In the absence of any thing in the record it will be presumed that such assistant is employed merely as an individual, to assist the postmaster in the discharge of his official duties. *Raisler v. Oliver*, 213.

POWER OF SALE.

See MORTGAGES, 4, 5, 8.

POWERS.

See TRUSTS, 8-12.

PRACTICE.

See APPEAL, PLEADING, TRIAL.

PREFERENCES.

See HUSBAND AND WIFE, 12.

PRESUMPTIONS.

See CARRIERS, 1; CORPORATIONS, 9, 12; EMINENT DOMAIN, 1, 2; EVIDENCE, 11, 12; FRAUD; HOMICIDE, 2; HUSBAND AND WIFE, 20-22; NEGLIGENCE, 2; RAILROADS, 10, 21; SALES, 1.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PRIORITY.

See CHATTEL MORTGAGES; HOMESTEAD, 4; JUDGMENTS, 2; MORTGAGES, 2.

PRIVILEGE.

See WITNESSES, 2.

PRIVILEGED COMMUNICATIONS.

See ATTORNEY AND CLIENT; LABEL, 2.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

PROCESS.

See JUDGMENTS, 1, 3.

PROFITS.

See HUSBAND AND WIFE, 12-14; TRUSTS, 4.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROXIMATE CAUSE.

See NEGLIGENCE, 3, 4.

PUBLICATION.

See LIBEL, 1-6.

PUBLIC LANDS.

1. CONSTRUCTION OF GRANTS OF, BY WHAT LAW DETERMINED.—Where public lands bounded on streams or other waters are granted by the United States without reservations or restrictions, the riparian rights of the grantee are determined by the law of the state in which the lands are situated. *Lamprey v. State*, 541.
2. ISSUANCE OF PATENT TO LAND BORDERING ON MEANDERED LAKE, EFFECT OF.—After the United States has, by patent, disposed, without reservation or restriction, of lands bordering on a meandered lake, they have nothing further to convey, and therefore a subsequent patent to land formed outside the meander line by the gradual drying up of the lake is inoperative and void. *Lamprey v. State*, 541.
3. PATENTS—UNAUTHORIZED ISSUE OF—EVIDENCE.—The act of government officers in issuing a patent to public land which had never been within their control, or had been withdrawn from that control at the time they undertook to so act, is absolutely void. *Cummings v. Powell*, 610.
4. PATENT TO—UNAUTHORIZED ISSUE OF.—A patent to public land issued by government officers acting without authority is absolutely void. *Cummings v. Powell*, 610.
5. PATENT TO—IMPEACHMENT OF.—The validity of a patent to land, though in due form, is subject at all times to the inquiry whether the officers of the government who issued it had lawful authority to do so. *Cummings v. Powell*, 610.
6. PATENT TO—IMPEACHMENT OF.—A government patent to lands may be shown to be void by extrinsic parol evidence establishing a want of authority for its issue. *Cummings v. Powell*, 610.

See MUNICIPAL CORPORATIONS, 1; RAILROADS, 1, 2; WATERS, 6.

PUBLIC POLICY.

See CARRIERS, 3; CORPORATIONS, 21; FORGERY, 2.

PUNISHMENT.

CONSTITUTIONAL LAW.—THE POWER TO ENACT RULES UPON A SPECIFIC SUBJECT INCLUDES the power to enforce penalties for their violation. *People v. Welch*, 793.

See VAGRANCY.

QUASHING.

See TRIAL, 7.

RAILROADS.

1. **EMINENT DOMAIN—APPROPRIATION OF STATE LANDS.**—State tide lands cannot be taken by a railroad company in the exercise of the right of eminent domain, unless there is either express or clearly implied authority to that effect contained in the statute relied upon as conferring such right. *Seattle etc. Ry. Co. v. State*, 866.
2. **EMINENT DOMAIN—DAMAGES FOR APPROPRIATION OF STATE LAND.**—The state, as owner in fee of tide lands abutting on both sides of a lawful street, is entitled to damages for the occupation of such street for ordinary railroad purposes. *Seattle etc. Ry. Co. v. State*, 866.
3. **EMINENT DOMAIN—INTERSECTING RAILROADS—CONDEMNATION OF CROSSING.**—A railway seeking to appropriate a right of way to cross the tracks of a railroad already in existence may, by stipulation tendered, bind itself to assume the burden of maintaining frogs and crossing apparatus. *Seattle etc. Ry. Co. v. State*, 866.
4. **EMINENT DOMAIN—INTERSECTING RAILROADS—PRACTICE.**—Two or more intersecting railroads should show an attempt to agree upon connections and points of crossing before resort is had to judicial proceedings to condemn a right of way to cross by the later and intersecting road. *Seattle etc. Ry. Co. v. State*, 866.
5. **EMINENT DOMAIN—INTERSECTING RAILROADS—NECESSITY FOR CROSSING MATTER FOR JUDICIAL DETERMINATION.**—Under statutes providing that any railway may cross, intersect, join, and unite with any other railway before constructed, at any point in its route, and if the two companies cannot "agree on the compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined in the manner provided by law for the taking of lands for the construction of a railroad," and, if the court shall be satisfied, by competent proof, that the property sought to be taken is necessary for the purposes of the enterprise, it shall make an order for a jury, etc., the necessity for such connection, or crossing, is always a matter for judicial determination in the event of the failure of the companies to agree thereon, and the intersecting railway cannot determine this matter for itself, nor will the court declare a necessity for a crossing at a certain point desired by the new road, where it would greatly injure the senior road, and near by which the new road can pass without such injury, and with merely an additional expense. *Seattle etc. Ry. Co. v. State*, 866.
6. **INTERSECTING RAILROADS—CROSSINGS IN STREET.**—No railroad company is permitted to claim that tracks, no matter how numerous, when con-

structed lengthwise on a public street, constitute a part of its yard, so that they may not be crossed by a new railroad when there is reasonable necessity therefor. In such case, all that the railroad has is a permanent license, not coupled with any interest in, or ownership of, the land, or any contingency through which it may acquire the land. *Seattle etc. Ry. Co. v. State*, 866.

7. **INTERSECTING RAILROADS—APPROPRIATIONS OF CROSSINGS.**—The railway first constructed has the prior right to the right of way, and one which is subsequently constructed so as to cross, or parallel, the one already in existence must accommodate itself to the established way of the first. It cannot be constructed so as to overlap such right of way and existing tracks longitudinally, so that the first company cannot use its track during the operation of the road of the last company. *Seattle etc. Ry. Co. v. State*, 866.

8. **OCCUPATION OF LAND WITHOUT LEGAL RIGHT—EJECTMENT—PLEADING.** In an action by a landowner to recover damages for the trespass of a railroad company in constructing its road without having obtained the right to do so, either by grant or proceedings in eminent domain, the defendant is entitled to withdraw a portion of its answer in which it seeks to obtain a condemnation of the land alleged to be the right of way strip, but a mere motion for leave to make such withdrawal is to be regarded as an application addressed to the discretion of the trial judge, whose ruling will not be interfered with by the appellate court unless he has been guilty of an abuse of discretion. *Kremer v. Chicago etc. Ry. Co.*, 468.

9. **DUTY OF, TO AGED AND INFIRM PASSENGERS.**—A railroad company is not bound to receive on its cars a passenger who, because of extreme youth or old age, or any physical or mental infirmities, is unable to take care of himself, unless he has an attendant with him; but if a person whose inability to care for himself is apparent or made known to the company's servants, and renders special care necessary, is actually accepted as a passenger, without an attendant, the company is negligent if it does not exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, that care being such as is reasonably necessary to insure the safety of the passenger, in view of his mental and physical condition. *Croom v. Chicago etc. Ry. Co.*, 557.

10. **NEGLIGENCE—PRESUMPTION OF.**—An injury to a railroad passenger which has no connection with the machinery or appliances of transportation, and so disconnected from the operation of the business of the carrier as not to involve the safety or sufficiency of the instrumentalities of transportation, or the negligence of his servants, raises no presumption of negligence against the carrier, and the burden of proof to show such negligence is upon the party who avers it. *Fleming v. Pittsburgh etc. Ry.*, 835.

11. **CARRIERS—LIABILITY FOR NEGLIGENCE TO PASSENGER RIDING ON PASSES.** A person accepting and riding upon a free railroad pass containing stipulations absolving the carrier from liability for negligence is bound by its terms, and cannot recover for personal injuries suffered by him through the negligence of a servant of the carrier. *Muldoon v. Seattle etc. Ry. Co.*, 901.

12. **A RAILROAD CORPORATION PLACING A BARBED WIRE FENCE ALONG ITS RIGHT OF WAY,** and suffering it to become out of repair so that loose

- livestock may pass through such fence and enter upon such right of way, is not liable for injuries to such trespassing animals from their being frightened by passing trains and caused to run on and become wounded by such fence. *Railway Co. v. Ferguson*, 217.
13. A RAILWAY CORPORATION AS TO STOCK STRAYING UPON ITS RIGHT OF WAY is not under any obligation different from that of other owners or occupiers of real estate. *Railway Co. v. Ferguson*, 217.
14. NEGLIGENCE—PROXIMATE CAUSE.—Running a railroad train through a town at a rate of speed in excess of that permitted by ordinance is not proximate cause, so as to make the company liable for the death of a boy nine years of age who is killed in attempting to board such moving train within the town limits. *Western Ry. v. Mutch*, 172.
15. AN INFANT GOING WITH OTHER CHILDREN UPON STREET CARS LEFT in a public street by a street railway corporation, in violation of a municipal ordinance, must be regarded as a trespasser and joint actor with the other children, and therefore cannot recover compensation for injuries suffered by him either from any act done by himself or the other children, though the corporation knew that the cars would be attractive to children and was bound to anticipate what occurred. *Gay v. Essex etc. Ry.*, 415.
16. A RAILWAY CORPORATION IS NOT BOUND TO KEEP A LOOKOUT TO PREVENT BOYS FROM SWINGING ON THE LADDERS OF ITS MOVING FREIGHT TRAINS, and its failure to do so is not negligence. *Catlett v. Railway Co.*, 254.
17. A SLOWLY MOVING FREIGHT TRAIN is not a dangerous machine, alluring to boys, so as to impose upon a railway corporation the duty of watching to see that no boy in stealing, or attempting to steal, a ride thereon is injured. To a boy who thus rides, or attempts to ride, the company owes no duty save not to injure him wantonly. *Catlett v. Railway Co.*, 254.
18. NEGLIGENCE—RAILROAD COLLISIONS—DUTY OF PASSENGER AT CROSSING.—A passenger on a street-car has the right to presume that he will be carried safely, and when approaching a railroad crossing is under no obligation to look and listen for an approaching train or to jump from the car in apprehension of possible collisions. *O'Tools v. Pittsburgh etc. R. R.*, 830.
19. NEGLIGENCE AT RAILROAD CROSSINGS—LIABILITY FOR PERSONAL INJURY. If a collision between the cars of a street-car company and those of a steam railroad company at a crossing is the result of the negligence of both companies each is answerable to a passenger of the street-car company injured thereby; but if the collision is the result wholly of the negligence of the street-car company, the railroad company is not answerable. *O'Tools v. Pittsburgh etc. R. R.*, 830.
20. STREET RAILWAY COMPANIES, DEGREE OF CARE REQUIRED OF, IN CARRIAGE OF PASSENGERS.—A street railway company is bound to exercise the utmost skill, diligence, and human foresight in conveying its passengers, and is liable for slight negligence. *Spellman v. Lincoln Rapid Transit Co.*, 753.
21. STREET RAILWAY COMPANIES—NEGLIGENCE PRESUMED FROM HAPPENING OF ACCIDENT—BURDEN OF PROOF.—In an action against a street railway company for personal injuries caused by the derailment of a car—the burden of proof lies on the carrier to rebut the presumption of negligence which is raised by the occurrence of such an accident, by showing that it was produced by causes wholly beyond his control, and that he has not been guilty of the slightest negligence contributing thereto, and

that, by the exercise of the utmost human care, diligence, and foresight, the casualty could not have been prevented. *Spellman v. Lincoln Rapid Transit Co.*, 753.

22. NEGLIGENCE—STANDING ON CAR PLATFORM.—It is not negligence *per se* for a passenger to stand upon the front platform of the trail car of a moving cable train, in the absence of any rule of the company against it and when it has been the custom for passengers to occupy that position. In cases of this nature the question of contributory negligence is generally for the jury. *Muldoon v. Seattle etc. Ry. Co.*, 901.

See CARRIERS, 1; DEEDS, 8, 9; JUDGMENTS, 8-11; LICENSE; MASTER AND SERVANT, 16.

RATIFICATION.

See BROKERS, 4-6; DEEDS, 6; MECHANICS' LIENS, 1.

REAL PROPERTY.

1. TRESPASSERS, LANDOWNER'S LIABILITY TO.—THE OWNER OF PRIVATE GROUNDS is under no obligation to keep them in a safe condition for the benefit of trespassers or those who may go upon them uninvited from curiosity or motives of private convenience in no way connected with the owner. *Railway Company v. Ferguson*, 217.
2. HIGHWAYS AND STREETS.—THE OWNER OF LAND HAS THE RIGHT TO EXCAVATE UNDER A SIDEWALK, if he thereby does not violate any ordinance or regulation of the city. *Allen v. Boston*, 423.
3. NEGLIGENCE.—OWNER OF A LOT IS NOT NEGLIGENT IN NOT BUILDING A CELLAR-WALL so as to keep out sewage when he has no knowledge that the sewer will leak. *Allen v. Boston*, 423.
4. IF AN INFANT TRESPASSES ON THE PREMISES OF ANOTHER, AND IS THERE INJURED by something which he does while so trespassing, he cannot recover of the owner of the premises, unless the injury was wantonly inflicted or was due to his recklessly careless conduct. *McGuinness v. Butler*, 412.
5. INFANT'S RIGHT TO RECOVER FOR DAMAGES OCCASIONED BY HIS OWN WRONGFUL ACT does not exist, though he was acting when injured as children of his age, intelligence, and experience may be expected to act under like circumstances. *McGuinness v. Butler*, 412.
6. INFANT, INJURED BY HIS OWN WRONGFUL ACT.—IF A CHILD PLAYING ON THE STREET INTERFERED with marble slabs leaning against a house, whereby they are thrown over upon him and he is injured, he cannot recover of the owner of the premises, though the latter may have been negligent in leaving the slabs in the position in which he did, and the child in playing and doing with them as he did only acted as a child of his age might reasonably be expected to act. *McGuinness v. Butler*, 412.
7. TRESPASSING STOCK, LIABILITY FOR INJURIES TO.—A LANDOWNER is not liable for injuries received by stock trespassing on his premises on account of such premises being in a dangerous condition and not being kept in proper and safe repair. *Railway Co. v. Ferguson*, 217.

See EVIDENCE, 2, 3; HIGHWAYS; LICENSE; PARTY WALLS; RAILROADS, 13; TRUSTS, 7; VENDOR AND PURCHASER.

REASONABLE DOUBT.

See DEFINITIONS.

RECEIVERS.

1. **APPOINTMENT OF, WHEN PROPER.**—The appointment of a receiver is, as a general rule, discretionary. The discretion is not arbitrary or absolute; it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of promoting the ends of justice and of protecting the rights of all the parties interested in the controversy and subject matter, and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding. *Fort Payne Furnace Co. v. Fort Payne Coal etc. Co.*, 109.
2. **CIRCUMSTANCES NOT WARRANTING APPOINTMENT OF.**—A creditor's bill which merely avers that the directors of the defendant corporation, acting in pursuance of a vote of the stockholders, had ordered the issue of bonds, secured by a trust deed on all its property, that a portion of those bonds had been issued and disposed of, that the directors afterwards voted to sell the corporate property at a public sale, that the directors then issued a circular letter appealing to the stockholders to purchase the bonds as the only means of saving the property from sale and obviating an entire sacrifice of all the corporate effects in the payment of the bonds already disposed of, does not present a case for the appointment of a receiver, there being no allegations that any of the directors had an interest in the bonds or in the sale thereof, or that those bonds were not sold for their value and to *bona fide* purchasers, nor any facts stated which would show that the proposed sale was not in strict compliance with the requirements of the trust deed. *Fort Payne Furnace Co. v. Fort Payne Coal etc. Co.*, 109.

RECORD.

See FORGERY, 6; SEARCHERS OF RECORDS.

REDEMPTION.

See MORTGAGES, 7, 8; TRUSTS, 9.

REGISTRATION.

See DEEDS, 5, 6; SALES, 3.

RELICCTIONS.

See WATERS, 6.

RENT.

See LANDLORD AND TENANTS, 2, 3.

RESCISSION.

See VENDOR AND PURCHASER, 6-8, 13, 16.

RES GESTÆ.

See EVIDENCE, 9.

RES JUDICATA.

See JUDGMENTS, 16-18.

RESTITUTION.

See INFANTS.

RIGHT OF WAY.

See DEEDS, 8, 9.

RIPARIAN RIGHTS.

See PUBLIC LANDS, 1; WATERS, 3, 5, 6.

SALARY.

See OFFICERS, 4.

SALES.

1. **CARRIER, DELIVERY OF GOODS TO, PASSES TITLE TO CONSIGNEE.**—The legal presumption is that upon the delivery of goods to a common carrier the title thereto vests in the consignee, and the carrier, having the right to rely upon this presumption, in the absence of express notice from the consignor to the contrary, may settle with the consignee in case the property is lost, stolen, or destroyed. *Dyer v. Great Northern Ry. Co.*, 506.
2. **CARRIERS, LIABILITY OF, TO CONSIGNEE.**—The consignment of a chattel by a common carrier to one who has purchased it on the understanding that the title thereto is not to vest in him until the price is fully paid gives him a special property in such chattel, and, if it is destroyed while in the carrier's possession, he is entitled to recover its full value from the latter. *Dyer v. Great Northern Ry. Co.*, 506.
3. **NOTICE OF TITLE TO CHATTEL, CARRIER NOT AFFECTED WITH, BY FILING OF BILL OF SALE.**—The registration of a conditional contract of sale, according to the provisions of the Minnesota statute, does not affect a carrier who has received the subject matter of the contract for transportation to the vendee, with notice of the fact that the title to the property is still in the vendor. Hence, if the property is destroyed while in the carrier's hands, he may show, in bar of an action by the seller to recover its value, that a settlement has already been made with the vendee. *Dyer v. Great Northern Ry. Co.*, 506.
4. **PURCHASERS.**—It is not true that if a purchaser on credit has no reasonable expectation of being able to pay that this is equivalent to an intention on his part not to pay. Evidence that he had no reasonable expectation of being able to pay tends to prove that it was his intention not to pay, but whether such intention existed or not is a question of fact, which the jury must be permitted to determine. *Gavin v. Armistead*, 262.
5. **SALES FOR CASH—DELIVERY OF BILL OF LADING—WAIVER OF PREPAYMENT.**—On a sale of goods for cash without express reservation of title, the voluntary delivery and transfer by the vendor to the purchaser of a bill of lading for the goods is *prima facie* a waiver of prepayment, especially as to third persons. *Johnson-Brinkman Commission Co. v. Central Bank*, 615.
6. **SALES FOR CASH—PAYMENT—WAIVER.**—A sale for cash can be avoided by the vendor upon failure by the vendee to pay the purchase money while the property is in his hands or in the hands of any other purchaser, un-

less the payment of the purchase price has been waived. *Jackson-Brinkman Commission Co. v. Central Bank*, 615.

7. THE EXPENSES OF KEEPING PERSONAL PROPERTY which the vendee refuses to receive cannot, after an action has been sustained to recover the entire contract price, be recovered in a second action brought by the vendor against the vendee. *Putnam v. Glidden*, 394.

See BROKERS; CARRIERS, 1; ESTOPPEL, 2; MORTGAGES, 4, 5, 8-11; PAYMENT, 5; VENDOR AND PURCHASER; TRUSTS, 8-12.

SCHOOLS.

See CHARITIES, 5, 6.

SEARCHERS OF RECORDS.

NEGLECT—LIABILITY OF A SEARCHER OF RECORDS.—A searcher of records who, in the preparation of an abstract of title, assumed the information derived from a marginal reference in the record book to be correct, does so at his peril, and is liable in damages to an employer who suffers loss owing to his omission to examine the record of the instrument referred to. *Wacek v. Frink*, 502.

SELF-DEFENSE.

See HOMICIDE, 9, 11-16.

SEPARATE PROPERTY.

See HUSBAND AND WIFE, 10-16.

SERVICES.

See CONTRACTS, 4-6.

SEWERS.

See MUNICIPAL CORPORATIONS, 6-8; REAL PROPERTY, 2.

SHERIFF.

See EXECUTION, 5.

SIDEWALKS.

See REAL PROPERTY, 2.

SLAVERY.

See VAGRANCY.

SPECIAL COUNSEL.

See MUNICIPAL CORPORATIONS.

SPECIFIC PERFORMANCE.

See CONTRACTS, 6, 9; VENDOR AND PURCHASER, 1.

STATES.

THE STATES DO NOT ENFORCE THE CRIMINAL LAWS OF THE UNITED STATES. *People v. Welch*, 793.

See CONFLICT OF LAWS; CONTRACTS, 1-3; CORPORATIONS, 11, 14, 21; EVIDENCE, 4; INTERSTATE COMMERCE; JURISDICTION, 2; STATUTES, 1; TRIAL, 2; WATERS, 6.

STATUTE OF FRAUDS.

See BROKERS, 9; CONTRACTS, 6-9; VENDOR AND PURCHASER, 10-12.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STATUTES.

1. EXTRATERRITORIAL OPERATION OF.—The laws of a state can have no force *proprio vigore* outside of that state. *Falls v. United States Sav. etc. Co.*, 194.
 2. SUBJECT MATTER OF WHEN NOT VARIANT FROM TITLE.—An act empowering the formation of "co-operative associations" is not open to the constitutional objection that its title does not express its subject, when its provisions are couched in language which shows that it was designed mainly for the purpose of enabling men of small capital, or of no capital but their labor and skill in trades, to form corporations and thus give employment to such capital or labor and skill. *Finnegan v. Noerenberg*, 552.
 3. CONSTRUCTION OF.—HEADINGS OF CHAPTERS of the code or of any other statute may be examined for the purpose of ascertaining the intention of the legislature with respect to such chapters or statutes. *Keyes v. Cyrus*, 296.
 4. CONSTITUTIONAL LAW.—THE POLICE POWER OF THE STATE extends in the direction of so regulating the use of private property, or of so restraining personal action, as manifestly to secure, or to tend to the comfort, prosperity, or protection of the community. *People v. Ever*, 788.
 5. CONSTITUTIONAL LAW—PARENT AND CHILD.—BY PREVENTING THE EXHIBITION OF CHILDREN OF TENDER AND IMMATURE AGE upon the theatrical or other public stage, the legislature is exercising that right of supervision and control of children which in every civilized state inheres in the government, and which nothing in the relation of parent and child should be deemed to forbid. *People v. Ever*, 788.
 6. CONSTITUTIONAL LAW.—A STATUTE FORBIDDING THE EXHIBITION OR EMPLOYMENT OF A FEMALE CHILD apparently, or actually, under the age of sixteen years, either as a dancer or in any theatrical exhibition, or in any exhibition dangerous to the health, limb, life, or morals of the child, and making a violation of such statute a misdemeanor, is a constitutional and valid exercise of the police power of the state. *People v. Ever*, 788.
 7. CONSTITUTIONAL LAW.—IT IS NOT MATERIAL TO A BILL PROVIDING FOR THE ORGANIZATION of a new county, that many of its provisions are intended to be only preliminary and temporary, as, that the first election for supervisors shall take place before the county has been divided into supervisor districts. *People v. County of Glenn*, 305.
- See CONSTITUTIONS; EVIDENCE, 4; HOMESTEAD, 2; INTERSTATE COMMERCE, 2; NEGLIGENCE, 8; RAILROADS, 5; SALES, 8; VAGRANCY.

STOCKHOLDERS.

See CORPORATIONS, 15-18.

STREET RAILROADS.**See RAILROADS, 15, 18-22.****STREETS.****See HIGHWAYS; JUDGMENTS, 8-11; MUNICIPAL CORPORATIONS, 1; RAILROADS, 2, 6.****SUBROGATION.**

1. **THERE MUST BE A NEW AGREEMENT**, either express or implied, or some obligation, interest, or right, legal, or equitable, on the part of a party making a payment or advance in respect to the matter concerning which payment is made of the moneys advanced in order to entitle him to subrogation. *Skinner v. Tirrell*, 447.
2. **A MERE VOLUNTEER** is not entitled to subrogation. *Skinner v. Tirrell*, 447.
3. **ONE WHO ADVANCES MONEY TO A WIFE LIVING SEPARATE FROM HER HUSBAND**, and which she uses for necessities, is not entitled to be subrogated as against him to the rights of a person by whom necessities are furnished and to whom the wife made payment out of the moneys so advanced. *Skinner v. Tirrell*, 447.

See MORTGAGES, 6.**SUBSCRIPTION.****See CORPORATIONS, 3.****SUNDAY.**

HOLIDAY, WRIT OF ATTACHMENT ISSUED ON, NOT VOID, WHEN.—The issuance of a writ of attachment on a debt past due is a purely ministerial act, and therefore does not fall within the inhibition of a statute which declares that no "judicial business can be transacted on Sunday or any legal holiday." *Whipple v. Hill*, 742.

SURETYSHIP.

IF A PROMISSORY NOTE IS EXECUTED BY ONE PERSON TO SECURE the payment of another promissory note made by another person, the maker of the first note is in legal effect a surety of the maker of the second, and is relieved from liability by a release of a judgment recovered on the second note, or by the failure of the judgment creditor to enforce such judgment and his selling or joining in the sale of the land upon which it was a lien for less than its real value, when by taking out an execution on his judgment and selling the land at its real value he would have realized sufficient to have paid the second note, and thereby have rendered any resort to the surety unnecessary. *Montgomery v. Sayre*, 271.

See APPEAL, 14-16; BONDS.**SURGEONS.****See PHYSICIANS AND SURGEONS.****SURRENDER.****See LANDLORD AND TENANT.**

TAXES.

THE TAX FOR COUNTY PURPOSES MUST BE ON THE ENTIRE COUNTY.—It is not within the power of the legislature to divide the county into taxing districts, and thereby to authorize the levy of a greater tax in one part of the county than in another, for a purpose which is not local, but is purely a county purpose, if there is a provision in the state constitution exacting uniformity of taxation. *Hutchinson v. Ozark Land Co.*, 258.

TEAMSTER.

See MASTER AND SERVANT, 1, 2.

TELEGRAPH COMPANIES.

DAMAGES—MENTAL ANGUISH AS AN ELEMENT OF.—A telegraph company is not liable for mental suffering and pain resulting from its neglect to transmit a message promptly, although advised by the contents of the message that such suffering and pain will naturally result from its failure to deliver the message without delay. *Connell v. Western Union Tel. Co.*, 575.

TENDER.

1. **TENDER WITH CONDITION ANNEXED NOT VALID.**—When a larger sum than that tendered is in good faith claimed to be due, the tender is not effectual if it is coupled with such conditions that the acceptance of it, as made, will involve an admission by the creditor that no more is due. *Moore v. Norman*, 526.
2. **MORTGAGE, LIEN OF, NOT DISCHARGED BY CONDITIONAL TENDER.**—The maker of a note already past its maturity and still in the hands of the payee cannot insist upon its surrender as a condition precedent to the payment of a sum asserted by him to be the full amount of the balance due thereon, but alleged by the payee to be insufficient to liquidate the debt, and a tender thus qualified will not discharge the lien of a mortgage given to secure the note. *Moore v. Norman*, 526.

THEATERS.

See STATUTES, 5, 6.

THREATS.

See HOMICIDE, 3.

TORTS.

See NEGLIGENCE, 3.

TRADEMARKS.

1. **TRADE NAME—RIGHT TO SELL UNPATENTED DRUG.**—Those who have lawfully and fairly acquired a knowledge of the composition of an unpatented drug have the right to manufacture and sell it, following the formula of the inventor, and to publish, by label or otherwise, the truth, that their compound is made in accordance with that formula. *Watkins v. Landon*, 560.
2. **TRADE NAME, NO EXCLUSIVE PROPERTY IN, WHEN.**—A person beginning to manufacture and sell an unpatented drug cannot acquire an exclusive property in the inventor's name, if it has been so long used in the mar-

ket, for the purpose of designating the preparation, as to have acquired the quality of a description thereof. *Watkins v. Landon*, 560.

TRADE NAMES.

See TRADEMARKS.

TREASURER.

See CORPORATIONS, 7-10; OFFICERS, 1.

TRESPASS.

See RAILROADS, 8.

TRESPASSERS.

See EXECUTION, 2, 4; LICENSE, 2; NEGLIGENCE, 5; RAILROADS, 15; REAL PROPERTY, 1, 4, 7.

TRIAL.

1. EVIDENCE—DISCRETION OF THE COURT.—When an examination of the books of a broker is sought for the purpose of discrediting his alleged purchase of certain stocks the court has discretion to exclude from such examination the names of the other customers of the broker as they appear on his books. *Gillett v. Whiting*, 762.
2. TRIAL—EFFECT OF EVIDENCE, WHEN A QUESTION FOR THE COURT.—Where the evidence as to the law of another state consists entirely of the judicial opinions of that state, the question of their construction and effect is one for the court alone. *Thomson-Houston Electric Co. v. Palmer*, 536.
3. THE LEGAL SUFFICIENCY OF THE EVIDENCE to warrant a verdict is a question of law which the court must decide. It matters not when or how it arises. And if the evidence offered by the plaintiff is not such as could support a verdict in his favor, the jury have no duty to perform, and the judge should tell them so, and direct them to return a verdict for the defendant. *Catlett v. Railway Co.*, 254.
4. JUDGMENT AS A GROUND FOR CONTINUANCE.—If a judgment has been rendered in an action which cannot be pleaded as a bar because the right of appeal therefrom still exists, and a second action is brought involving the same issues, the first action and the judgment therein constitute a good ground for the continuance of the second until the final determination of the former action. *Brown v. Campbell*, 314.
5. POWER OF THE COURT TO DIRECT A VERDICT.—The declaration in a state constitution that judges shall not charge juries with regard to matters of fact, but shall declare the law, does not deprive the judge of the power to direct the verdict when there is no evidence to support the cause of action or of defense. *Catlett v. Railway Co.*, 254.
6. JURIES—CHALLENGES—INSUFFICIENT GROUNDS FOR.—That one of the jurors summoned in a criminal case was at the time serving as a juror in another case; that another had not been a resident of the state or county for the preceding year and was excused for cause; that another failed to answer when called; that another was over the age of seventy years and was challenged for cause; and that another, on his examination as to his competency, stated that he had heard a part of the evidence at the preliminary examination, and from that evidence had formed an opinion as to the guilt or innocence of the accused, and that, in his

judgment, such opinion would not bias his verdict, constitute no ground of challenge to the jury selected to try the case. *Arp v. State*, 137.

7. **JURIES—MOTION TO QUASH VENIRE.**—That some of the jurors summoned on a special venire to try a criminal case had served as regular jurors during the preceding week; that another had been summoned as a regular juror for the week of the trial and had not been a resident of the state or county for the preceding year, and that another had served as a juror at a term of the court in the same year, are not sufficient grounds for quashing the venire. *Arp v. State*, 137.
 8. **CRIMINAL TRIALS—PROVINCE OF COURT AND JURY.**—If one of the defendant's counsel in a criminal trial tells the jury that they are "above the court and the supreme court in their right to decide the case," it is proper for the trial judge to obviate any erroneous impression which might be produced by the remark, and to instruct the jury that they are judges of the facts but not of the law. *Springfield v. State*, 85.
 9. **INSTRUCTIONS EXPLAINING ANOTHER PORTION OF A CHARGE, WHEN PROPER.**—Written instructions given in a criminal trial, at the request of the defendant, may properly be explained by supplementary instructions orally requested by the counsel for the state. *Lewis v. State*, 75.
 10. **ACQUITTAL—THE DISCHARGE OF A JURY** in a criminal case, without the consent of the accused, and not called for by some pressing necessity, operates as an acquittal. *Jones v. State*, 150.
 11. **ACQUITTAL BY UNAUTHORIZED DISCHARGE OF JURY.**—If a jury in a criminal case returns a verdict to the clerk of the court after it has adjourned for the day, without the consent of the accused, and thereupon disbands and goes home, and the verdict is entered the next day, this operates as an acquittal. *Jones v. State*, 150.
- See **APPEAL**; **MALICIOUS PROSECUTION**, 2; **NEW TRIAL**; **PHYSICIANS AND SURGEONS**, 7.

TROVER.

TROVER AND CONVERSION CANNOT BE MAINTAINED when the plaintiff has neither the right of property in, nor the right of possession to, the chattels alleged to have been converted. *Johnson-Brinkman Commission Co. v. Central Bank*, 615.

TRUST DEEDS.

See **ATTACHMENT**, 1; **INTERVENTION**, 2; **RECEIVERS**, 2; **TRUSTS**, 6, 8-12.

TRUSTS.

1. **PARTIES, TRUSTEE AND BENEFICIARY.**—If a trustee is authorized to pay over any part of the principal of a trust fund to a designated person, whenever he shall regard such payment as wise and expedient, and demanded by the needs of the beneficiary, and other persons are entitled, upon the death of the beneficiary, to receive whatever of the principal remains unexpended, the latter are not necessary parties to a suit involving such fund, but are sufficiently represented by the trustee. *Evans v. Wall*, 406.
2. **TRUSTEE DE SON TORT.**—One who, knowing that property is held by a surviving partner, and is assets of a late firm, and who with such partner takes such property and applies it to their own uses, should be treated as a trustee *de son tort*, and held answerable in an equitable action. *Russell v. McCall*, 807.

3. **TRUSTEE EX MALEFICIO, WHO IS.**—One who obtains a conveyance of land from a former owner by fraudulently giving him to understand that it is for the purpose of supporting an earlier defective conveyance, and thus validating the title of one who claims thereunder, may be charged by the latter as a trustee *ex maleficio*. In such a case the rights of the *cestui que trust* do not depend upon the existence of a fiduciary relation in regard to the title between him and the fraudulent grantee, nor upon the fact that he has some legal claim to the land which he could have enforced against the original owner thereof. *Rollins v. Mitchell*, 519.
4. **GAINS AND PROFITS TO WHOM BELONG.**—All gains and profits arising from land, which come into the hands of a trustee, or fiduciary agent, by means of his position, belong to the owner of the land, and not to the trustee. *Connecticut etc. Ins. Co. v. Smith*, 656.
5. **RESULTING TRUSTS, WHICH CAN BE REBUTTED BY EXTRINSIC EVIDENCE,** are those claimed upon a mere implication of law, and not those arising from the failure of an express trust for imperfection or illegality. *Woodruff v. Marsh*, 846.
6. **CONTRACT TO INSTITUTE FORECLOSURE PROCEEDINGS ONLY IN A CERTAIN MANNER NOT INVALID, WHEN.**—A provision in a trust deed executed by a railway company to secure an issue of bonds, by which it is stipulated that individual bondholders are to be debarred from foreclosure proceedings until the trustee has been requested by a reasonable proportion of the bondholders to institute such proceedings, and has refused to comply with that request, is valid and obligatory. Such a stipulation does not divest the bondholders of their right to judicial remedies, but merely imposes certain conditions upon them in respect to the exercise of that right. *Seibert v. Minneapolis etc. Ry. Co.*, 530.
7. **ENFORCEMENT OF TRUST.**—A trust in real estate may be enforced at any time within ten years from its termination under the Missouri statute. *Connecticut etc. Ins. Co. v. Smith*, 656.
8. **TRUST DEEDS.—POWER OF SALE** contained in a trust deed, in which the legal estate has been conveyed to the trustee to secure a debt due to a creditor, is not a mere naked authority, but a power coupled with an interest, and is irrevocable by the grantor. *Schanewerk v. Hoberecht*, 631.
9. **TRUST DEEDS—SALES UNDER.**—A power of sale contained in a deed of trust must be strictly followed to render its exercise valid, and a sale at a place other than that designated in the deed does not deprive the grantor of the right to redeem. *Schanewerk v. Hoberecht*, 631.
10. **TRUST DEEDS—SALES UNDER.**—A deed pursuant to a sale under a power contained in a trust deed not made at the place designated therein passes the legal title, and is a good defense, as an outstanding title, to an action of ejectment brought by a purchaser at a subsequent foreclosure sale, under the trust deed against the grantor therein. *Schanewerk v. Hoberecht*, 631.
11. **TRUST DEEDS—SALES AND CONVEYANCES BY TRUSTEE.**—If a trustee, holding property under a trust deed containing a power of sale, conveys the property, even in breach of the trust, he extinguishes his power, and a subsequent sale by him is void. The title thus first conveyed by him becomes absolute in his vendee in a court of law. *Schanewerk v. Hoberecht*, 631.
12. **TRUST DEEDS—PLACE OF SALE.**—A power of sale contained in a trust deed, providing that the sale "shall be made at the courthouse door,"

means that one sale of the property shall be made at the door of one particular courthouse, and not that several sales shall be made at different times, at the door of several courthouses. *Schanewerk v. Hoberecht*, 631.

See CHARITIES; CLOUD ON TITLE; CREDITOR'S SUIT, 2; JUDGMENTS, 6; PARTNERSHIP, 4; WILLS, 2.

UNDUE INFLUENCE.

See WILLS, 4-6.

UNITED STATES.

See CRIMINAL LAW, 2; PUBLIC LANDS; STATES.

USAGE.

See BANKS, 7.

USES.

See CHARITIES.

USURY.

1. **CONFLICT OF LAWS.**—A contract entered into in Alabama with a foreign loan association, by which the borrower, who does not share in the profits or assets of the corporation and has no voice in its government, agrees in effect to pay interest greatly in excess of eight per cent per annum is usurious in Alabama, and can be enforced there only as to the principal, although such contract is not usurious under the law of the state where such association was created. *Falls v. United States Sav. etc. Co.*, 194.

2. **CONSTRUCTION OF CONTRACT.**—In determining whether a contract is infected with usury, its substance and effect, not its form, are material. The intent to take or reserve more than lawful interest for a loan of money or the forbearance of a debt must exist, and this is deduced from the relations of the parties, their acts contemporaneous with, or subsequent to, the contract and all attendant circumstances. When this intent exists and such is the substance and effect of the contract, no form or covering which may be given it, no device or shift can sustain it. *Falls v. United States Sav. etc. Co.*, 194.

See CORPORATIONS, 23.

VACANCY.

See OFFICERS, 3.

VAGRANCY.

CONSTITUTIONAL LAW—VAGRANCY—INVOLUNTARY SERVITUDE.—A statute authorizing a vagrant, not accused of crime, to be hired for a specified period to the highest bidder, after a finding of the fact of vagrancy by a jury, is void, as being in conflict with both the state and federal constitutions prohibiting "slavery or involuntary servitude except in punishment of crime whereof the party shall have been duly convicted." *In re Thompson*, 639.

VARIANCE.

See APPEAL, 11; FORGERY, 4.

VENDOR AND PURCHASER.

1. **BREACH OF CONTRACT FOR SALE OF LAND—REMEDY.**—In case of a breach of contract for the sale of land the vendor can either sue at law for damages or resort to equity for specific performance. *Hogan v. Kyle*, 910.
2. **BREACH OF CONTRACT FOR SALE OF LAND—SUFFICIENCY OF COMPLAINT.**—A complaint based upon a contract for the sale of land providing for a cash payment of one-third of the purchase price and the balance in two equal installments, time being made of the essence of the contract, and the complaint simply alleging the contract, failure to pay, the ownership of the property, and the tender of a good deed prior to the commencement of the suit, is insufficient either at law or in equity to authorize the recovery of a money judgment for the deferred payments when the suit is not instituted until more than two years after the maturity of the last installment, and the delay is wholly unexplained. *Hogan v. Kyle*, 910.
3. **BREACH OF CONTRACT FOR PURCHASE OF LAND—SUFFICIENCY OF COMPLAINT.**—A complaint in an action to recover the purchase price for a breach of a contract to purchase land, which on its face shows such a delay on the part of the vendor in bringing his action, that, unexplained, it amounts to a waiver of his rights under the contract and an acceptance of a forfeiture, is clearly insufficient to authorize a recovery, especially when time is made the essence of the contract. *Hogan v. Kyle*, 910.
4. **CONTRACT FOR SALE OF LAND—ACTION FOR PURCHASE PRICE.**—In an action by the vendor to recover for a breach of a contract for the sale of land, he cannot retain the title thereto and recover the entire purchase price. *Hogan v. Kyle*, 910.
5. **BREACH OF CONTRACT FOR SALE OF LAND—MEASURE OF DAMAGES.**—In an action at law by a vendor to recover damages for the breach of a contract for the sale of land, the measure of damages is not the contract price, but the difference between that price and the price for which the land could have been sold at the time of the breach, and such damages must be alleged and proved like any other fact in the case. *Hogan v. Kyle*, 910.
6. **RESCISSION.**—A CONTRACT FOR THE SALE OF LAND may be rescinded by the vendee, when his agreement to purchase the land at twice its value has been induced by false representations of the vendor's agent that there is great demand for building lots on the land, that a railroad company is about to erect shops in the vicinity, that a syndicate had been formed to secure the land, and had offered a large sum of money for it, but he is guilty of such gross carelessness in acting upon such representations without making inquiry as to their truth, that he is not entitled to recover his costs in his suit in equity to rescind the contract. *Sutton v. Morgan*, 841.
7. **EVIDENCE ADMISSIBLE ON THE ISSUE OF POSSESSION BY PURCHASER.**—Where, in an action by the purchaser to rescind a contract for the sale of town lots, and recover back money paid thereon, the vendor is seeking to show that the contract is rendered obligatory by the fact of the purchaser's having entered into possession, it is not error to allow the plaintiff to be asked, during his cross-examination, to designate the lots to which the contract relates upon a map of the town produced by the defendant. In such a case the plaintiff's ability to point out the

lots may properly serve as a basis for argument in connection with other facts in evidence. *Nelson v. Shelby Mfg. etc. Co.*, 116.

8. **PURCHASER'S ENTRY INTO POSSESSION OF LAND, EVIDENCE ADMISSIBLE TO SHOW.**—In an action by the purchaser to rescind a contract for the sale of land, and to recover back the purchase money paid thereon, it is competent, on the issue of his having entered into possession, to give in evidence his statements and admissions that he had offered the land for sale, or placed it in the hands of real estate agents, and to show that he has spoken of it as his property. Such evidence tends to establish claim of ownership and the exercise of control. *Nelson v. Shelby Mfg. etc. Co.*, 116.
9. **MEMORANDUM OF SALE NOT AUTHORIZING PURCHASER TO TAKE POSSESSION.**—A receipt for the purchase money of land of the following tenor: "Received of F. N. one hundred and sixty-six dollars, being one-third cash payment on lot No. 28 of block No. 94. Bond for title to said lot will be delivered on execution of notes for balance of purchase money and return of this receipt duly indorsed"—does not authorize the purchaser to take possession of the land until there is a further compliance with the terms of sale. *Nelson v. Shelby Mfg. etc. Co.*, 116.
10. **MEMORANDUM OF SALE.**—A contract for the sale of land is not sufficient to satisfy the requirements of the statute of frauds if the precise terms of payment cannot be ascertained therefrom without resorting to parol evidence. *Nelson v. Shelby Mfg. etc. Co.*, 116.
11. **STATUTE OF FRAUDS—PAYMENT OF PURCHASE PRICE.**—A contract for the sale of land invalid for the want of a sufficient memorandum is not rendered obligatory by the payment of the purchase money, in whole or in part, unless the purchaser has also, in pursuance of the contract, entered into possession of the land. *Nelson v. Shelby Mfg. etc. Co.*, 116.
12. **MONEY PAID ON CONTRACT VOID UNDER STATUTE OF FRAUDS MAY BE RECOVERED, WHEN.**—The amount paid on a contract for the sale of land may be recovered back, without any previous demand, in all cases where the purchaser has not subscribed a note or memorandum in writing within the meaning of the statute of frauds, and was not let into possession, so as to bring the contract within the exception provided in the statute, and the vendor has not subscribed a note or memorandum in writing within the requirements of the statute of frauds, and has not estopped himself from asserting the invalidity of the contract. *Nelson v. Shelby Mfg. etc. Co.*, 116.
13. **FRAUD FOR WHICH A CONTRACT MAY BE RESCINDED.**—The failure to perform a mere promise or undertaking—something to be done in the future—does not authorize the rescission of a contract on the ground of fraud. It is the making of a promise, having no intention at the time to perform it, that constitutes fraud which justifies the rescission of a contract induced by such promise. *Nelson v. Shelby Mfg. etc. Co.*, 116.
14. **COVENANT FOR MARKETABLE TITLE.**—A covenant in a contract for the sale of land that the property is "to be free from all liens and encumbrances" and the purchase money is "to be refunded if title should not prove good on examination of records, or cannot be made good," is equivalent to a covenant to convey a good marketable title. *Herman v. Somers*, 851.
15. **MARKETABLE TITLE** in equity is one in which there is no doubt involved either as to matter of law or fact. If there is color of outstanding title

which may prove substantial, though there is not enough in evidence to enable the chancellor to say so, a purchaser is not compelled to take it and encounter the hazard of litigation. *Herman v. Somers*, 851.

16. **MARKETABLE TITLE—RESCISSION OF CONTRACT OF PURCHASE.**—A vendee may rescind his contract for the purchase of land when he is entitled to a marketable title and the vendor acquired the land at sheriff's sale while the vendor's husband fraudulently procured such sale to defeat the rights of the real owners who had recovered a judgment in ejectment against him and had conveyed to third persons. *Herman v. Somers*, 851.
17. **A VENDOR'S LIEN IS NOT WAIVED BY TAKING THE INDIVIDUAL NOTE, BOND, OR COVENANT OF THE GRANTEE** for the purchase money remaining unpaid, though the grantor relies on the solvency and financial ability of the grantee, and may not rely upon any lien or know that he is entitled to any, and may not have in contemplation the enforcement of any lien at the time when he takes such note or other obligation. *Maroney v. Boyle*, 821.
18. **A VENDOR'S LIEN IS NOT ALLOWED TO PREVAIL AGAINST ONE WHO TAKES AN ENCUMBRANCE UPON THE LAND, or an interest therein, or a conveyance thereof, in good faith and without notice of the lien and for a valuable consideration parted with before such notice.** *Maroney v. Boyle*, 821.

See **BROKERS**, 1-4, 9; **CONTRACTS**, 8, 9; **LICENSE**, 1; **SALER**.

VENDOR'S LIEN.

See **EXECUTION**, 6; **VENDOR AND PURCHASER**, 17, 18.

VENUE.

See **INFORMATION**, 2.

VERDICT.

See **NEW TRIAL**; **TRIAL**, 3, 5, 11.

VICE-PRINCIPAL.

See **EVIDENCE**, 9; **MASTER AND SERVANT**, 17, 18.

VOLUNTEERS.

See **SUBROGATION**, 2.

WAGES.

See **ATTACHMENT**, 1; **MASTER AND SERVANT**, 4.

WAIVER.

See **PAYMENT**, 5; **PLEADING**, 6; **SALES**, 5, 6; **VENDOR AND PURCHASER**, 3, 17.

WATER COMPANIES.

See **CONTRACTS**, 10; **DAMAGES**.

WATERS.

1. **DEFINITION.**—A watercourse is a living stream with definite banks and channel and a mouth distinguishable from its source, not necessarily

running all the time, but fed from more permanent sources than mere surface water. *Chamberlain v. Hemingway*, 330.

2. **NAVIGABLE WATERS, WHAT ARE.**—Navigable waters include not only those in which the tide ebbs and flows, but those which are navigable in fact, and afford a channel for commerce or subserve any other beneficial public use. *Lamprey v. State*, 541.
3. **RIPARIAN RIGHTS.**—A mere sluiceway or inlet from the ocean into which the sea water runs when the tide rises, and out of which the water flows when the tide falls, is not a watercourse, and the abutting owners on it have no riparian rights. The owner of the land through which it runs may fill it up and convert it into upland. *Chamberlain v. Hemingway*, 330.
4. **ACTION FOR DRAINING OFF.**—If, by drains, ponds or other waters on the plaintiff's land are lost to him he sustains an actionable damage, and may recover of the party maintaining such drain or other means of draining off such waters. *Covert v. Cranford*, 826.
5. **RIPARIAN PROPRIETORS.**—Parties who, while constructing a conduit under a contract with the city, impair the flowing of a stream of water to the injury of a riparian proprietor are liable to him for the damages sustained during the prosecution of their work. The fact that they are acting under the direction of the city cannot excuse them. *Covert v. Cranford*, 826.
6. **RIPARIAN RIGHTS OF OWNERS OF LAND BORDERING ON LAKES.**—By the common law, the same rules as to riparian rights which apply to streams apply also to lakes or other bodies of still water. Hence, if a meandered lake is non-navigable in fact, the patentee of land bordering thereon takes to the middle of the lake, while, if the lake is navigable in fact, its waters and bed belong to the state in its sovereign capacity, and the riparian patentee takes the fee only to the waters' edge, but with all the rights incident to riparian ownership on navigable waters, including the right to accretions or relictions formed in front of his land by the action or recession of the water. *Lamprey v. State*, 541.

See BOUNDARIES; JURISDICTION, 2-4; PUBLIC LANDS, 1.

WILLS.

1. **CONSTRUCTION.**—Courts, in reading wills, always supply obviously omitted words whenever the word omitted is apparent, and no other word will supply the defect. *Mitchell v. Donohue*, 279.
2. **CONSTRUCTION—PRECATORY TRUSTS.**—A will by which a testator makes a bequest to his wife in lieu of dower, and then gives her four separate legacies "for her to help as she sees fit" each of four persons named at her decease, the residue of said legacies "to go to W." who will do by said four persons as he sees fit and see that they are comfortably provided for during their lifetimes "unless my wife sees fit to make a will and dispose of the remainder of these legacies differently, then they go as she wills" followed by a clause giving the wife another legacy to use as she might see fit in caring for C. must be construed as giving to the widow the five legacies as a trustee, and each upon separate trusts until her death with power to expend the legacies in helping the beneficiaries, or to invest them in part and so expend the balance, but before entering upon either of the trusts she must give a bond, and should she decline either trust, the probate court can designate a successor to hold during her life, whose duty it would then be to apply the money for the

help of the beneficiaries, as the widow should from time to time direct. In case of the prior death of any one of the four legatees, the residue arising therefrom should be invested and accumulate during the life of the widow, when the whole residue becomes a common fund in the hands of W. for the benefit of the survivors of the four, unless the widow otherwise appoints a trustee by will, under reasonable terms, to carry out the testator's purpose. If C. survives the widow, a new trustee must be appointed to expend any balance of her legacy according to her needs. If there is any failure by the trustee to exercise an honest discretion in favor of any beneficiary, he or she can obtain relief in the probate court or in equity. The mode of help extended in all cases rests largely in the discretion of the trustee subject to direction by the court. The balance unexpended at the conclusion of the trusts forms part of the testator's residuary estate. *Dexter v. Evans*, 836.

3. **OLOGRAPHIC—WHAT SUFFICIENT.**—The words: "Crolldepdro, february 3, 1892. this is to serifey that ie levet to mey wife Real and persmal and she to dispose for them as she wis," constitute a good olographic will, and should be read as follows: "Corral de Piedra, February 3, 1892. This is to certify that I leave to my wife [my] real and personal [property], and she to dispose of them as she wishes." *Mitchell v. Donohue*, 279.
4. **UNDUE INFLUENCE—MENTAL CAPACITY—EVIDENCE OF.**—The contents of a will constitute the highest evidence of the capacity or incapacity of the testator. If its provisions under all the circumstances are just and reasonable, this is a circumstance tending to prove capacity and to disprove undue influence precisely as an absurd and unreasonable will tends to prove the contrary. *Crandall's Appeal*, 375.
5. **MENTAL CAPACITY—UNEQUAL PROVISIONS AS EVIDENCE OF UNDUE INFLUENCE.**—If the jury find from all the evidence, giving the character of the contents of the will its due weight as evidence, that the testator had sufficient mental capacity, then the equity or inequity of the disposition of the estate does not invalidate the will. *Crandall's Appeal*, 375.
6. **WILLS—CAPACITY AND UNDUE INFLUENCE—VALUE OF TESTIMONY OF ATTESTING WITNESSES.**—The evidence of the attesting witnesses to a will as to mental capacity or undue influence is not entitled to special consideration or prominence merely because they are attesting witnesses. On the contrary, the value of their evidence is exactly the same as that of any other witnesses of equal intelligence, with equal means of knowledge and observation, and equally credible. *Crandall's Appeal*, 375.

See CHARITIES, 2-6; CONTRACTS, 4-6; DEVISE; JUDGMENTS, 16.

WITNESSES.

1. **CRIMINAL LAW—CROSS-EXAMINATION OF ACCUSED.**—A person accused of crime testifying in his own behalf for the sole purpose of establishing his innocence, although he is not directly questioned as to his guilt, may be cross-examined relative to his flight soon after the crime was committed for the purpose of evading prosecution. Such cross-examination is proper as affecting the credibility of the accused as a witness. *State v. Duncan*, 838.
2. **CRIMINAL LAW—CROSS-EXAMINATION OF ACCUSED.**—A person accused of crime testifying in his own behalf is subject to be contradicted, disputed, or impeached the same as any other witness. Cross-examination for this

purpose is not in violation of a constitutional provision that no person accused of crime shall be compelled to give evidence against himself. *State v. Duncan*, 888.

3. **CREDIBILITY OF, A QUESTION FOR THE JURY.**—Since it lies entirely with the jury to determine what weight should be given to the testimony of a witness who is shown to have made contradictory statements, the court may properly refuse an instruction to the effect that proof of the making of such statements by a witness goes to his credibility. *Springfield v. State*, 85.
4. **COMPETENCY.**—A party competent to prove the motives and intentions which have governed his conduct may state in general terms that he did, or refrained from doing, a certain thing on account of information received from third persons; but he cannot go into details as to conversations with third persons, not held in the presence or hearing of the opposite party. *Lawson v. Conway*, 17.
5. **CRIMINAL LAW—EVIDENCE—OPINION AS TO CAUSE OF DEFENDANT'S FLIGHT.**—For the purpose of rebutting the inference arising from the flight of an accused, the mere opinion of a witness that "the defendant seemed afraid of" the father of the deceased, is incompetent. *Lewis v. State*, 75.
6. **EVIDENCE—OPINION AS TO FOOTPRINTS.**—A witness in a criminal case is allowed to state that he measured tracks found at the place where a crime was committed, and compared them with tracks made by the accused the next day, and that they corresponded; but he is not allowed to say that a particular shoe which he found on the foot of the accused would make such a track, nor that in his judgment it was his track, nor to give his opinion on the subject at all. He must state the facts of identification, and it is for the jury to find from the facts deposed to whether the tracks were made by the accused or not. *Hodge v. State*, 145.
7. **MALPRACTICE—EVIDENCE.**—In an action against a physician for malpractice, a witness who is well acquainted with the ability of the plaintiff to perform manual labor both before and since the injury was sustained is competent to testify to the inability of the plaintiff to perform such labor since his injury, as compared with his ability to perform it before the injury was received. *Lawson v. Conway*, 17.

See **HOMICIDE**, 3, 19; **WILLS**, 6.

WORDS AND PHRASES.

See **DEFINITIONS**.

WRONGDOERS.

See **JOINT LIABILITY**; **JUDGMENTS**, 5-7; **NEGLIGENCE**, 5.

1. 1. 1.

W

3851

